Province of
British Columbia

1983

Report on
Statutory Succession Rights

LAW REFORM COMMISSION OF BRITISH COLUMBIA

MINISTRY OF ATTORNEY GENERAL

84- 3303 /

LAW REFORM COMMISSION OF BRITISH COLUMBIA

REPORT ON STATUTORY SUCCESSION RIGHTS

LRC 70

December 1983

The Law Reform Commission of British Columbia was established by the *Law Reform Commission Act* in 1969 and began functioning in 1970.

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Canadian Cataloguing in Publication Data

Law Reform Commission of British Columbia
Report on statutory succession rights

Includes bibliographical references.
"LRC 70".
ISBN 0-7718-8408-7

1. Inheritance and succession - British Columbia. 2. Wills - British Columbia. 3. British Columbia. Estate Administration Act. 4. British Columbia. Wills Variation Act. I. Title.

KEB244.A72L38 1984 346.71105'2 C84-092055-5

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To the Honourable Brian R. D. Smith, Q.C.
Attorney General of the
Province of British Columbia:

The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON
STATUTORY SUCCESSION RIGHTS

Legislation affects succession rights in a number of ways. Two statutes in particular have a profound effect on the devolution and distribution of property. The *Estate Administration Act* governs succession when the deceased failed to make a will validly disposing of all of his property. The *Wills Variation Act* empowers the courts to vary testamentary dispositions in order to provide adequately for the deceased's spouse and children.

Criticism has been directed at both of these statutes. Neither statute has kept pace with changing economic and social conditions, and each fails, at least in part, to answer contemporary social needs.

In this Report, the Commission considers these two statutes as well as other legislation which affects succession rights. Recommendations are made to modernize the law, as well as to ensure that these various statutes operate consistently.

CHAPTER I INTRODUCTION

A. General

A variety of mandatory or discretionary rights to succeed to another's property are determined by statute, independent of the testator's directions or intention. In this Report we will examine these statutory succession rights. In particular, we will explore the problems which arise when a person dies without making a valid will directing the distribution of all of his estate, or makes a valid will unmindful of his responsibilities to family or dependants who survive him.

If a person dies without having made a valid will, or if his will is inadequate to dispose of the whole of his estate, the estate which is not disposed of by will passes on an intestacy. In British Columbia, legislation has been enacted to determine how this property should be distributed. The governing statute is the *Estate Administration Act*[1].

If a person makes a will which fails to provide adequately for persons who have a moral claim for support or for participation in the deceased's estate, in some circumstances those persons may apply to the court for a greater portion of the estate. An application of this kind is made pursuant to the *Wills Variation Act*[2] (formerly known as the *Testator's Family Maintenance Act*).

In our Report on *The Making and Revocation of Wills* we listed several goals for our project on wills and succession. These are modernization, simplification and consolidation of succession legislation. In addition to succession legislation, we must also direct our attention to legislation bearing upon matrimonial property. In 1978 the *Family Relations Act*[3] was enacted. Under Part III of that Act a regime of deferred community property was created. That regime figures significantly in the law respecting devolution of property on death. Various problems arise from conflicts between the provisions of the *Estate Administration Act*, the *Wills Variation Act* and the *Family Relations Act*, as well as other Acts which touch upon spousal rights and obligations, including the *Wills Act*,[4] the *Insurance Act*[5] and the *Uniform Retirement Plan Beneficiaries Act*.[6] We will be making recommendations with a view to achieving harmony among these various Acts.

In Chapter II we discuss the intestate provisions contained in the *Estate Administration Act* and make specific recommendations for reform. Chapter III deals with the *Wills Variation Act*. In Chapter IV we discuss the relationship among the *Estate Administration Act*, the *Wills Variation Act* and other legislation affecting matrimonial property and the interests of spouses and dependants of the deceased.

B. The Working Paper

This Report was preceded by a Working Paper which generated a large volume of carefully considered responses. In addition, the Working Paper was the subject of discussion and debate at two meetings of the Wills and Trusts Subsection of the Canadian Bar Association. Comment on particular aspects

[1] R.S.B.C. 1979, c. 114.
[2] R.S.B.C. 1979, c. 435.
[3] R.S.B.C. 1979, c. 121.
[4] R.S.B.C. 1979, c. 434.
[5] R.S.B.C. 1979, c. 200.
[6] Uniform Law Conference of Canada, Consolidated Uniform Acts.

of the tentative proposals is referred to in the following chapters of this Report. The Commission is grateful to those people who devoted their time and expertise to the consideration of the Working Paper.

A. The "Statutory Will"

Human nature being what it is, not everyone attends to the execution of a will. In the absence of valid testamentary directions, the law must provide for the distribution of a deceased's estate. That distribution is called "intestate succession."

Failure to execute a will is not the only cause of intestacy. A person may choose to die intestate, or intestacy may occur through neglect or by operation of law. For example, a will may be improperly executed, revoked by marriage, or partially revoked by marital breakdown.

Patterns of succession have altered with the needs of society. Today it is primarily a means of determining entitlement to a deceased's real and personal property. Originally, it was regarded as a means of transferring family rights and obligations, vested in the head of the family, to his successor:[1]

> The rights and obligations which attached to the deceased head of the house would attach, without breach of continuity, to his successor; for, in point of fact, they would be the rights and obligations of the family, and the family had the distinctive characteristic of a corporation—that it never died . . . The original Will or Testament was therefore an instrument, or (for it was probably not at first in writing) a proceeding by which the devolution of the *Family* was regulated. It was a mode of declaring who was to have the chieftainship, in succession to the Testator.

Intestate succession in British Columbia is governed by the *Estate Administration Act*. The law relating to distribution of property is set out in sections 85 to 112 of that Act. These sections, which govern the distribution of the testator's real and personal estate, are based upon the provisions of the English *Statute of Distribution, 1670*,[2] which governed the intestate succession of personalty.

The term "descent" was formerly used to describe the devolution of real estate. "Distribution" was used to refer to the devolution of a deceased's personal estate:[3]

> Descent is defined as taking real estate by inheritance, that is, as heir of the former holder . . . The Inheritance Act states that it is "the Title to inherit Land by reason of Consanguinity, as well where the Heir shall be an Ancestor or collateral Relation, as where he shall be a Child or other Issue". As used in olden times, it was an apt expression, for it was a maxim of the law that on the death of the tenant in fee the land should *descend* and not *ascend* . . . but now a title of inheritance ascends as well as descends, although it is still called a descent. In a legal system . . . where the real and personal property of a decedent is vested in his personal representative and where both devolve according to the same rules . . . it matters little that in the technical language of the law "descent" is used in respect of real estate and "distribution" for the division of the personal estate of an intestate.

The provisions of the *Estate Administration Act* relating to intestate succession in theory provide for the distribution of the deceased's estate according to the "collective view of the community as to what is fair and equitable in the circumstances."[4] These provisions constitute a kind of "statutory will."[5] Just as an executor is bound, after payment of debts, to distribute the deceased's estate to beneficiaries designated by will, an administrator is bound to distribute the estate of an intestate among those entitled by statute. In

---

[1] *See* Maine, *Ancient Law*, (5th ed., 1881), at 184.

[2] 22 & 23 Car. 2, 10.

[3] *Re Stone*, [1924] S.C.R. 682, [1925] 1 D.L.R. 60, 70; *see also Re Chantler*, (1926) 31 O.W.N. 193.

[4] Ontario Law Reform Commission, *Report on Family Law, Part VI, Support Obligations*, 1975, at 2.

[5] *Re Harris*, (1914) 33 O.L.R. 83, 22 D.L.R. 381.

order that intestate provisions continue to reflect the "collective view of the community" it is important, particularly during inflationary times, to review them periodically.

Any scheme of intestate succession is to some extent arbitrary. It is difficult to devise an arbitrary scheme for intestate succession that will function fairly in all cases. The collective view of the community may tend to vary from case to case on what might constitute an appropriate distribution.

Many of society's ideas respecting intestate succession are borrowed from the civil or Roman law. For several reasons, early Romans possessed a "singular horror"[6] of dying intestate. First, naturally enough, a Roman citizen's heirs were his children. An honour accorded only the most beloved of a Roman citizen's sons was emancipation. Emancipation signified that the son was independent of his father's authority. It also, notionally, severed the ties of blood between the father and his son. The result was that only unemancipated children, those not worthy of the honour of emancipation, would inherit on an intestacy. Second, in some cases if a Roman citizen died childless, his property was divided among all Roman citizens of the same family name as the deceased[7] on the theory that all persons possessing the same family name shared a common ancestor.

Modern intestate succession corresponds more nearly to what would be directed by will than it did in ancient Roman times. Nevertheless, there is a lesson to be drawn from the example of Roman intestate succession. Not only must an arbitrary scheme of intestate succession fail, at least from time to time, to provide for fair distribution, depending on the circumstances of individual estates, but a change in social patterns will often render inadequate what appear to be satisfactory rules of intestate succession. One need only consider changing mores with respect to so-called common law relationships. The increase in stable relationships not sanctioned by marriage must also mean increased numbers of illegitimate children and surviving common law spouses. Their interests are largely ignored in modern succession legislation. That is a topic we examine in greater detail later in this Report. For the moment we merely observe that, no matter how perfectly rules for intestate succession meet conditions in 1983, factors peculiar to particular estates may cause unfair results from time to time. Everyone is still well advised to make a will tailored to his specific circumstances.

B. Scheme of Distribution

The scheme of intestate distribution in force in British Columbia is set out in Part VII of the *Estate Administration Act*. The relevant sections are as follows:[8]

> **Intestate leaving spouse and issue**
>
> **96.** (1) If an intestate dies leaving a spouse and issue, his estate, where the net value of it does not exceed $65,000, shall go to the spouse.
>
> (2) Where the net value exceeds $65,000, the spouse is entitled to $65,000, and has a charge on the estate for that sum.
>
> (3) Of the residue of the estate, after payment of the sum of $65,000, where the intestate dies leaving
>
> (a) a spouse and one child, 1/2 shall go to the spouse;
>
> (b) a spouse and children, 1/3 shall go to the spouse;

[6] Maine, *Ancient Law*, (5th ed., 1881), at 218.

[7] *Ibid.* at 221.

[8] Section 96 was recently amended to increase the spouse's preferred share from $20,000 to $65,000: S.B.C. 1983, c. 4. This amendment applies to estates of persons who die on or after Oct. 1, 1983.

(4) If a child has died leaving issue and the issue is alive at the date of the intestate's death, the spouse shall take the same share of the estate as if the child had been living at the date.

(5) In this section "net value" means the value of an estate wherever situated, both within and without the Province, after payment of the charges on it and the debts, funeral expenses, expenses of administration and probate fees.

Citizenship

97. The land in the Province of a person who is not a Canadian citizen and who dies intestate shall be distributed as if he had been a Canadian citizen.

Issue

98. If an intestate dies leaving

(a) issue, his estate shall be distributed, subject to the rights of the spouse, if any, per stirpes among the issue;

(b) a spouse but no issue, his estate shall go to the spouse.

Neither spouse nor issue

99. If an intestate dies leaving no spouse or issue, his estate shall go to his father and mother in equal shares if both are living, but if either of them is dead the estate shall go to the survivor.

No spouse, issue or parent

100. If an intestate dies leaving no spouse, issue, father or mother, his estate shall go to his brothers and sisters in equal shares, and if a brother or sister is dead, the children of the deceased brother or sister shall take the share their parent would have taken if living, but no further representation shall be admitted.

Where estate goes to next of kin

101. If an intestate dies leaving no spouse, issue, father, mother, brother or sister, his estate shall go to his nephews and nieces in equal shares, and in no case shall representation be admitted.

Distribution among next of kin

102. If an intestate dies leaving no spouse, issue, father, mother, brother, sister, nephew or niece, his estate shall be distributed equally among the next of kin of equal degree of consanguinity to the intestate, and in no case shall representation be admitted.

Kindred and half blood

103. For the purpose of this Part, degrees of kindred shall be computed by counting upward from the intestate to the nearest common ancestor and then downward to the relative. The kindred of the half blood shall inherit equally with those of the whole blood in the same degree.

Posthumous births

104. Descendants and relatives of the intestate, conceived before his death but born thereafter, shall inherit as if they had been born in the lifetime of the intestate and had survived him.

These provisions are intended to distribute the deceased's property in the same manner as he would probably have directed had he considered making a will. His debts and liabilities are to be paid. Provision is made for the surviving spouse. If the estate is small, most of it will go to the surviving spouse and if the estate is large, the deceased's children will share in it. If the deceased is not survived by spouse or children, the order of next-of-kin is prescribed: the deceased's parents or the survivor of them; his brothers and sisters; his nieces and nephews; next-of-kin of equal degree of consanguinity to the deceased. In the next section we will examine in closer detail the next-of-kin prescribed by this legislation and the adequacy of the portions they are to receive on an intestacy.

C. Next-of-Kin

At common law, rules were developed to determine who was entitled to succeed to the property of one who died intestate. Because various courts had jurisdiction to determine rights of succession the rules which were developed to determine successors varied depending on the nature of the property concerned. The descent of real property was determined, for example, by courts of common law. The distribution of personal property was within the jurisdiction of ecclesiastical courts, which developed rules modelled on the civil law.

The rules to determine next-of-kin for the purposes of distributing personal property were codified in the English *Statute of Distribution, 1670*.[9] In Canada, all the common law provinces enacted legislation patterned after that Act. In 1919 the Commissioners on Uniformity of Legislation in Canada commenced a project on devolution of real estate and intestate succession. Two uniform Acts were adopted in 1925. These have been revised periodically. The last revision was made in 1963. Our present legislation, which defines the next-of-kin for the purposes of intestate succession and which makes real and personal property subject to the same rules, is based upon that uniform legislation. Intestate succession is currently being reconsidered by the Uniform Law Conference. A new Uniform *Intestate Succession Act* has recently been tentatively accepted in principle.

1. Spouses

(a) Legal Spouse

At common law a surviving spouse was not considered the next-of-kin of the deceased in the strict sense of next in degree of kindred.[10] Some succession rights, such as dower and curtesy, did accrue at common law by virtue of marriage. The entitlement of the surviving spouse to succeed as the deceased's next-of-kin was created by statute. In fact, section 96 of the *Estate Administration Act* goes even further and gives the surviving legal spouse, after payment of debts, a first charge on the estate. If the intestate died before October 1, 1983, that first charge is $20,000. If the intestate died on or after October 1, 1983, it is $65,000.[11]

If the deceased is survived by one child, the surviving spouse is entitled to one-half of the residue of the estate. If more than one child survives the deceased, the surviving spouse is entitled to one-third of the residue. Issue of a deceased child share the portion that child would have received. If no child or issue survives the deceased, the entire estate goes to his spouse.

This legislation is more generous to the surviving spouse than was the common law. It has been observed:[12]

> The extension of the rights of a surviving spouse at the expense of the children and other kin of an intestate is the most striking feature of the development of the rules of intestate succession during this century . . . The increased rights of a surviving spouse reflect the changed view of the family which sees marriage "as a partnership in which husband and wife work together as equals", and regards "the wife's contribution to the joint undertaking, in running the home and looking after the children" as being "just as valuable as that of the husband in providing the home and supporting the family."

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[9] *See Doe D. Wood* v. *Deforrest*, (1883) 23 N.B.R. 209 (C.A.); *Re Kroesing*, [1928] 1 W.W.R. 224, [1928] 1 D.L.R. 643 (Alta.).

[10] *Re Henderson*, [1926] 2 D.L.R. 536, 53 N.B.R. 43; *Re Cleveland*, (1890) 29 N.B.R. 70, *aff'd* 19 S.C.R. 78.

[11] S.B.C. 1983, c. 4.

[12] J. Gareth Miller, *The Machinery of Succession*, (1977), at 96.

In the Working Paper we observed that the preferred share of $20,000 was intended to secure adequate provision for the surviving spouse. If the estate was small, most, if not all, of it would go to the surviving spouse. No doubt these provisions were adequate protection when a matrimonial home might be worth under $10,000, and the cost of living was much less than it is now. Today, however, an estate of $50,000 to $100,000 is considered a "small" estate. In many intestacies the surviving spouse, after receiving the preferred share of $20,000, must share the balance of the estate with the children of the marriage. As a result, it was possible that on an intestacy a surviving spouse would be left without adequate funds for his or her maintenance or support. After publication of the Working Paper, the surviving spouse's preferred share was increased, as of October 1, 1983, to $65,000.[13] There is still some doubt whether this sum provides the surviving spouse with an adequate and fair share of the estate.

(b) Separated Spouse

The right of a surviving spouse to take on an intestacy is limited by section 111. Section 111 provides:

> **Separation as a bar**
>
> **111.** (1) The surviving spouse shall, in an intestacy, take no part of the deceased spouse's estate if the spouses had, immediately preceding the death of one spouse, separated for not less than one year with the intention of living separate and apart, and had not during that period lived together with the intention of resuming cohabitation, unless the court, on application, otherwise orders.
>
> (2) The court may, on the application of the surviving spouse, or of the executor or administrator, or of any person interested in the estate of the deceased spouse, and on evidence the court considers relevant, determine the matter, and the court may in its discretion direct the costs to be paid out of the estate of the deceased spouse.

This section promotes the policy that the affairs of separated spouses should be finalized subject to the prospect of reconciliation. It also creates a rebuttable presumption that spouses who live separate and apart intend to remain living separate and apart, and in that case the surviving spouse is not permitted to share in an intestacy unless the court, in its discretion, makes such an order. The precursor to this section disqualified a surviving spouse who was living in an adulterous relationship at the time of the deceased spouse's death.[14] That disqualification was repealed in 1972.

The intention to live separate and apart required by section 111 must be mutual. If only one spouse had that intention section 111 does not apply. In *Re Munro*[15] the spouses lived separate and apart for more than a year before the husband's death. They had, however, agreed to reconcile at a time to be determined in the best interests of their children. Wootton J. held that the presumption to live separate and apart was rebutted by proof of a joint intention to reconcile. Similarly, in *Re Schanofski*,[16] section 111 did not apply because there was no joint intention to live separate and apart. The widow and child had left the husband more than one year prior to his death because he had not secured adequate accommodation for them. She intended to return when her husband purchased a suitable family home.

The mere fact of a separation of more than one year's duration is not proof of the requisite intent to sever marital ties. The question of whether the parties intended to separate is one of fact which must be determined by the court on

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[13] S.B.C. 1983, c. 4.

[14] *See, e.g., Burns* v. *Burns*, [1938] 3 W.W.R. 477 (P.C. on appeal from B.C.).

[15] [1975] 1 W.W.R. 83 (B.C.S.C.).

[16] (1980) 20 B.C.L.R. 397 (S.C. in Probate); *see also Re Kolbe*, (1982) 13 A.C.W.S. (2d) 190, [1982] B.C.D. Civ. 4171-01 (S.C. in Probate); *Dahlquist* v. *DeMorvay*, (1982) 18 A.C.W.S. (2d) 194 (B.C.S.C.).

the circumstances of each case before it.[17] In *Re Whidden*,[18] the husband and wife separated, partly because the wife had entered a hospital to be treated for leukemia. They had lived together since 1949, were married in 1966 and separated in 1972. The wife died in 1974. Campbell L.J.S.C. found that even though the spouses had maintained a reasonably cordial relationship, they had a mutual intention to live separate and apart. The husband was barred from taking on the intestacy by section 111.

If the parties have separated and the presumption to live separate and apart under section 111 is not rebutted, the court possesses a flexible jurisdiction to determine what the surviving spouse should receive. In *Re Murray*,[19] Hutcheon J. awarded a share of the deceased's estate to the surviving widow who, when she separated from her husband 17 years before his death, surrendered her one-half interest in the family home for $6,000. She was given a share of $10,000 in the $38,000 estate. The competing next-of-kin were four sisters of the deceased. Similarly, in *Re Cosco*[20] the husband and wife had been separated for five years. The husband had surrendered his joint equity in the matrimonial home. Upon his wife's death, he applied for a share of her estate. Skipp L.J.S.C. recognizing the husband's moral claim, awarded him one-sixth of the estate, a share equal to that of each of the five surviving children.

This jurisdiction resembles that of a court to provide for dependants of the deceased under the *Wills Variation Act*. It would not appear to have been the intention of the Legislature, when enacting section 111, to grant the courts wide powers to vary intestate succession provisions. We will discuss the court's power to vary intestate portions further in this chapter and in Chapter III when we consider the *Wills Variation Act*. As well, we will return to a discussion of the policy to finalize the affairs of separated spouses in Chapter IV, where we consider legislation respecting family property.

(c) Former Spouse

A divorced spouse will not take an intestate portion of the estate of a deceased spouse.[21] Even if the divorce is obtained in another jurisdiction and not recognized in British Columbia, the surviving former spouse is estopped from denying its validity if pecuniary advantage was obtained.[22] If the deceased remarried after obtaining an invalid divorce, evidence may be admitted to prove that the second marriage was invalid, preventing the second wife from sharing in the estate.[23]

(d) Common Law Spouse

A *de facto* or "common law" spouse has only limited rights under the Act. Section 85 provides in part:

> **85.** In this Part and Parts 10 and 11
>
> "common law spouse" means either a person who is united to another person by a marriage that, although not a legal marriage, is valid by common law, or a person who has lived and cohabited with another person as a spouse and has been maintained by that other person for a period of not less than 2 years immediately preceding his death;

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[17] *Re Cosco*, [1980] B.C.D. Civ. 4171-01 (Skipp L.J.S.C.).
[18] (Unreported) B.C.S.C. decision, Vancouver Registry No. 129797, Nov. 17, 1975, Campbell L.J.S.C.
[19] (Unreported) B.C.S.C. decision, 32 Adv. 260.
[20] *Supra*, n. 14; *see also Re Small*, (1982) 12 E.T.R. 17 (B.C.S.C.).
[21] *Re Plummer*, [1941] 3 W.W.R. 788, [1942] 1 D.L.R. 34 (Alta. C.A.).
[22] *Ibid.*; *Carter* v. *Patrick*, [1935] 1 W.W.R. 383, 49 B.C.R. 411, [1935] 2 D.L.R. 811 (B.C.S.C.).
[23] *Re Graham Estate*, (1937) 52 B.C.R. 481, (1937) 3 W.W.R. 413 (B.C.S.C.).

Section 86 provides:

> **86.** Where an intestate leaves surviving him in the Province a common law spouse or an illegitimate child, the court may order that there be retained, allotted and applied for the support, maintenance and benefit of the common law spouse or of the illegitimate child, or both, so much of the net real or personal estate, or both, of the intestate as the court sees fit, to be payable in the manner the court directs.

The term "common law spouse" is anomalous. In certain rare cases it is possible to have a "common law marriage." For example, in Scotland it appears that common law marriages are recognized. The term may also apply to a relationship between a man and a woman stranded on a desert island. In Canada, however, there is no such thing as a "common law marriage."

A relationship akin to legal marriage does have limited recognition. Some jurisdictions, by statute, give *de facto* spouses rights against each other, usually limited to legal support obligations. That limited recognition, however, does not confer all the incidents of a valid marriage on relationships akin to marriage. The only *marriage* recognized at law is one solemnized in accordance with statute. For these reasons, academics shun the use of the terms "common law marriage" or "common law spouse." The preferred terms are *de facto* marriage and *de facto* spouse, which mean a marriage or spouse *in fact*, but not recognized by law.

Notwithstanding that the terms "common law marriage" and "common law spouse" are technically unsound, they are generally used and understood. The term "common law spouse" is even defined and used in the *Estate Administration Act*.[24] This Report is being written for an audience which goes beyond lawyers and academics and while we are aware that these terms are colloquialisms and technically misleading, nevertheless, we believe that their general acceptance justifies their use.

A person who had lived with the deceased in a marriage valid by common law or who cohabited with the deceased and was maintained by him for more than two years immediately before his death, is entitled to maintenance from the estate of the deceased. The definition of common law spouse in the *Estate Administration Act* is a starting point to determining whether such a relationship does exist. Status as a common law spouse is a question of mixed fact and law and may be determined by reference to many factors, including community attitudes, living arrangements, duration of the relationship and public acknowledgement of the couple as husband and wife.[25] In *Jaremko* v. *Sinnott*,[26] the applicant lived with the deceased in a common law relationship for 36 years. She was granted two-thirds of the deceased's estate. The statutory next-of-kin were one sister and four children of a deceased sister. In *Re Seymour*,[27] the common law spouse and her illegitimate child were awarded the entire estate. In *Phipps* v. *Cartmill*,[28] a common law spouse was granted one-third of the estate, notwithstanding that the duration of cohabitation was brief and that she had not been wholly maintained by the deceased. The court thought it significant that the deceased had made an invalid will providing for his common law spouse. While evidence of a gift in an invalid will suggests that the court should make provision for the surviving

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[24] Section 86.

[25] *Phipps* v. *Cartmill*, (1980) 25 B.C.L.R. 222, (1982) 10 E.T.R. 137 (B.C.S.C.).

[26] (1978) 6 B.C.L.R. 17 (S.C.).

[27] (Unreported) B.C.S.C. decision, Vanc. Reg. No. 122564, 1973, *per* Munroe J.; *see also Re Nelson*, (1982) 28 R.F.L. (2d) 323 (B.C.S.C.).

[28] *Supra*, n. 25.

common law spouse, the fact that the deceased did not marry the applicant or make a will is not evidence that the deceased did not intend to provide for her.[29]

These sections of the *Estate Administration Act* are based upon the provisions of the British Columbia *Destitute Orphans Act* of 1877.[30] That Act empowered the Supreme Court to make an order for maintenance of the intestate's "concubine" and of an illegitimate child or children under 16, if he had made any provision for them within 12 months of his demise. The amount of maintenance was limited to the greater of $500 or 10% of the estate. The preamble to the Act read:

> Whereas, it sometimes happens that divers persons die within the Province of British Columbia intestate and possessed of considerable property situate in the said Province, and without in the said Province any heirs or persons entitled to make claims under the Statutes for the distribution of the estate, but leaving concubines and illegitimate children them surviving . . .

Apparently it was common for persons of European origin to cohabit with native Indians in relationships not sanctioned by marriage and the Act[31] was passed for their benefit. The Act, however, was general in its terms. The courts were uncomfortable exercising the jurisdiction conferred by the Act, which suggested that "the law . . . intended to recognize or put a premium upon immorality and to provide for a woman who is simply living in adultery with a man."[32] In *Manson* v. *Heaslip*,[33] for example, it was said:

> The section, though passed originally to meet social conditions, which happily no longer prevail in this province, has been retained by the Legislature and it is not my duty, as I understand it, to determine the wisdom of that legislation. It may be that it provides in a very modest way still for situations of the type which it was intended to cover, which may be described roughly as irregular unions between the aboriginal inhabitants of this province or others with them.

The *Destitute Orphans Act* is probably the earliest form of dependant's relief legislation in British Columbia. Notwithstanding the 19th century abhorrence of the "immorality" of relationships not sanctioned by marriage, it must be assumed that the prevailing social conditions made it desirable to give the courts discretion to provide for destitute "concubines" and illegitimate children. It is impossible to ascertain why the Act was drafted in such general terms that its scope went beyond providing for destitute native Indians. One reasonable hypothesis is that provincial legislation directed solely at Indians would have been *ultra vires* the provincial Legislature.

One can only speculate as well why relief was restricted to intestacies. Certainly the fact that a deceased makes no provision for a concubine or illegitimate child in his will does not alter the social need to provide for such dependants. It must be remembered that this was the period during which the principle of freedom of testation was at its strongest. Even when the *Testator's Family Maintenance Act* was enacted, some 43 years later, the Legislature did not feel that there should be scope for the alteration of a will to provide for common law spouses or illegitimate children.

The *Destitute Orphans Act* was radical in another respect. The deceased's estate was responsible for the maintenance of any illegitimate child "reputed to be by him begotten on any woman" provided he had made "any

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[29] *Re Cooper*, (1980) 30 O.R. (2d) 113 (H.C.J.); in *Godden* v. *Cookson*, (1981) 34 B.C.L.R. 263 (B.C.S.C.), *per* Meredith J., it was held that cohabitation and maintenance are sufficient to establish status as a "common law spouse" within the meaning of the *Estate Administration Act*, notwithstanding that one or both of the parties did not consider that they were living in such a relationship.

[30] S.B.C. 1877, No. 28.

[31] *Re Rosse Estate*, (1952) 4 W.W.R. (N.S.) 218 (B.C.S.C.).

[32] *Manson* v. *Heaslip*, [1949] 1 W.W.R. 717, at 718 (B.C.S.C.); *see also Re Rosse Estate*, *ibid.*

[33] *Ibid.* at 719.

provision" for the child within 12 months of his death. Under section 85 of the current Act, which defines "illegitimate child," no guidance is given respecting the determination of paternity. An illegitimate child's entitlement depends upon whether he was "under the care, control, maintenance or protection, either physically or financially, of his father for a period of not less than one year immediately preceding his father's death." The current requirements which must be met are substantially more rigorous than those under the original Act.

Essentially, the discretion exercised under section 86 is very similar to the discretion exercised by the courts under the *Wills Variation Act*[34] in that it is designed to ensure the deceased recognizes his moral obligations. Neither a common law spouse nor an illegitimate child, however, may apply under the *Wills Variation Act*. A surviving common law spouse and illegitimate child occupy a better position on an intestacy than if the deceased died testate without making adequate provision for them.

Section 86 of the *Estate Administration Act* should also be compared with the provisions of the *Family Relations Act*. Under the *Family Relations Act* a common law spouse may apply for maintenance or support provided the relationship lasted not less than two years[35] and the application is brought not more than one year after the parties ceased living together as husband and wife. The rights of a common law spouse against the estate of an intestate are similar to those rights enjoyed by common law spouses against each other during their joint lifetimes.

2. Children

(a) Legitimate Children

If the deceased's estate exceeds $65,000, the residue of the estate, after payment of the preferred share to the surviving spouse, is divided between the spouse and the deceased's child or children. If there is one legitimate child of the deceased, the surviving spouse and the child each take one-half of the remaining estate. If there is more than one child, then the spouse takes one-third of the residue and the children share equally in two-thirds of the residue.

(b) Children Born out of Wedlock

At common law, an illegitimate child was *nullius filius* ("no one's child"), and could not inherit upon an intestacy. In the absence of legitimate issue, his property would escheat to the Crown.[36]

Section 110 of the *Estate Administration Act* changes the common law. It provides that:

> **110.** For the purposes of this Act, an illegitimate child shall be deemed to be the legitimate child of his mother.

A similar provision is contained in the *Wills Act*. Section 30 of the *Wills Act* provides:

> **30.** In the construction of a will, except when a contrary intention appears by the will, an illegitimate child shall be treated as if he were the legitimate child of his mother.

The effect of these provisions may, in some cases, be that the interests of an illegitimate child are preferred over those of a legitimate child. In *Re Stone*,[37] a woman died leaving two illegitimate sons and several legitimate

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[34] *See, e.g., Sinclair* v. *Marne*, (1980) 24 B.C.L.R. 132 (B.C.C.A.).

[35] *See* section 1.

[36] *Re W.*, 56 O.L.R. 611, [1925] 2 D.L.R. 1177 (Ont. S.C.); *Re Miller*, (1957) 65 Man. R. 162, 22 W.W.R. 571 (Man. Q.B.).

[37] [1924] S.C.R. 682, [1925] 1 D.L.R. 60; *see also Pollock* v. *Marsden Kooler Transport Co. Ltd. and Piche*, (1951) 3 W.W.R. 266, *aff'd*. [1953] 1 S.C.R. 66; *Manson* v. *Haynes*, [1979] 1 W.W.R. 542 (B.C.S.C.).

children. One of the illegitimate sons died. It was held that his only heir was the other illegitimate son. Legislation deeming an illegitimate child to be the legitimate child of his mother had the effect of allowing a mother to inherit from her illegitimate child, and the other illegitimate child to inherit through his relationship to his mother. The legitimate children, it was held, were excluded by implication. Whether this result was desirable is open to question. This result arises out of the distinction drawn between legitimate and illegitimate children.

Under sections 85 and 86 of the *Estate Administration Act*, an illegitimate child is entitled to maintenance from his father. Section 85 provides in part:

> **85.** In this Part and Parts 10 and 11 . . .
> "illegitimate child" means, in respect of the estate of his father, an illegitimate child who was born out of wedlock and has not been legitimized by operation of law, and who was under the care, control, maintenance or protection, either physically or financially, of his father for a period of not less than one year immediately preceding his father's death.

The requirement of maintenance for a period of one year has been held to include gestation.[38]

(c) Adopted Children

Section 11 of the *Adoption Act*[39] provides in part:

> **Effect of adoption**
>
> **11.** (1) For all purposes an adopted child becomes on adoption the child of the adopting parent, and the adopting parent becomes the parent of the child, as if the child had been born to that parent in lawful wedlock.
>
> (2) For all purposes an adopted child ceases on adoption to be the child of his existing parents (whether his natural parents or his adopting parents under a previous adoption), and the existing parents of the adopted child cease to be his parents.

An adopted child will be treated as the natural and legitimate child of his adopting parents.[40] It would appear that the Legislature intended that an adopted child should not inherit from his natural parents.[41] Section 11(2) of the Act provides that, upon adoption, an adopted child ceases to be the child of his natural parents. However, in *Re Podolsky and Podolsky*,[42] a decision of the Manitoba Court of Appeal interpreting adoption legislation, it was held that an adopted child could inherit from his natural parents on an intestacy. Notwithstanding the intent of the relevant section to terminate prior parental ties, the child's succession rights were held to flow not from statute but from common law. An adopted child remains the lawful lineal descendent of his natural parents. It should be noted, however, that while the Manitoba Act provides that for all purposes the adopted child is the child of the adoptive parents, it does not expressly sever rights of succession between the child and his natural parents. In fact, before amendment the Manitoba legislation preserved the adopted child's right to inherit from his natural parents. That section has been repealed. For these reasons the Manitoba Act is distinguishable from the *British Columbia Adoption Act*. It is unlikely *Re Podolsky and Podolsky* would be followed in British Columbia.

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[38] *Re Collison*, [1974] 1 W.W.R. 293 (B.C.S.C.).

[39] R.S.B.C. 1979, c. 4.

[40] The validity of an adoption of a non-resident child is determined by the law where the adoption took place: *Re Niven*, (1942) 58 B.C.R. 176, [1942] 4 D.L.R. 285, [1942] 3 W.W.R. 692 (B.C.S.C.).

[41] *Re Jensen*, (1964) 47 D.L.R. (2d) 630 (B.C.S.C.); *Re White (Le Blanc)*, [1945] 1 W.W.R. 78, [1945] 2 D.L.R. 803 (Alta); *Re Niven*, *ibid*.

[42] (1980) 111 D.L.R. (3d) 159 (Man. C.A.).

The draft Uniform *Intestate Succession Act*, recently accepted in principle by the Uniform Law Conference, provides that a child's succession rights from and through one natural parent should not be severed by the adoption of the child by the other natural parent. This approach was taken in recognition that often, after divorce, children of the marriage will be adopted by one of the natural parents who has remarried.

It should be noted that preventing an adopted child from inheriting from his natural parents also prevents an adopted child from inheriting from relations traced through his natural parents, such as grandparents. Whether this is a desirable result depends, of course, on the circumstances. In many cases a natural parent or grandparent may wish their natural child or grandchild, who has been adopted by someone else, to share in an intestacy. For example, a husband and wife divorce. The wife is awarded custody of the children. The wife remarries and her second husband adopts her children. It is not uncommon to find that the first husband, or his parents, remain fond of the children, who constitute a significant part of their lives. We recognize that in circumstances like these, it may be desirable to permit the children to share in their natural parent's or grandparent's estates on an intestacy. Nevertheless, this kind of fine tuning would result in complex legislation very seldom needed. We do not think that the rare chance of not meeting an intestate's expectations in itself justifies reform. The possibility that intestate succession in isolated circumstances does not always correspond to what is fair or desirable is merely a good reason for making wills to take into account peculiar or unusual factors.

In any event, whether adoption should sever succession rights between the adopted child and his natural parents or other relatives is a question that should be examined in the context of adoption and not succession. One function served by severing succession rights is that the child is that much more like a natural child of his adopting parents. In many cases it is in that child's best interests to have ties neither with his natural parents, nor with relations traced through them. Consequently, adoption records are strictly controlled, and in many cases a child may never be aware he is adopted. Or, even if he knows he is adopted, he will have no way of finding out who his natural parents are. To determine whether this approach is right involves weighing policy decisions which are wholly unrelated to the law of succession.

Arguably it is not right to deprive a child of succession rights upon adoption, particularly if the child is too young to know that this is the effect of adoption. On the other hand, there is much to be said in favour of treating an adopted child as nearly as possible as if he were a natural child of his adopting parents. To this end, the severance of succession rights may be desirable. In the Working Paper we invited comments on this question. There was agreement that a child's rights of succession should probably be severed by adoption, but that this was a problem that should be addressed in a wider context than the law of succession. We will not further consider in this Report the question of whether reform of the effect of adoption on succession rights is needed.

3. Parents

If the deceased is survived by neither a spouse nor issue, the estate goes to his parents jointly, or the survivor of them. Section 99 of the *Estate Administration Act* provides:

Neither spouse nor issue

99. If an intestate dies leaving no spouse or issue, his estate shall go to his father and mother in equal shares if both are living, but if either of them is dead the estate shall go to the survivor.

Before this legislation, in the absence of a surviving spouse or children, the deceased's father would have been entitled to the whole of the personal estate of the intestate exclusive of all others.[43] In 1919, legislation was first enacted to permit the mother to share equally with the father.[44]

4. BROTHERS AND SISTERS, NIECES AND NEPHEWS, NEXT-OF-KIN

Sections 100 and 101 of the *Estate Administration Act* provide:

100. If an intestate dies leaving no spouse, issue, father or mother, his estate shall go to his brothers and sisters in equal shares, and if a brother or sister is dead, the children of the deceased brother or sister shall take the share their parent would have taken if living, but no further representation shall be admitted.

101. If an intestate dies leaving no spouse, issue, father, mother, brother or sister, his estate shall go to his nephews and nieces in equal shares, and in no case shall representation be admitted.

Upon first examination it might appear that section 101 is redundant because if there are no brothers and sisters who survive the deceased, nieces and nephews will take by representation under section 100. However, if that were to occur, the nieces and nephews would share *per stirpes* (nieces and nephews would share equally the portion their parent would have otherwise received). The effect of a different provision (section 101), in the event all of the deceased's brothers and sisters predecease him, is to divide the estate among the deceased's nieces and nephews *per capita* (nieces and nephews would share equally in the estate).

If the deceased is not survived by nephews and nieces, the estate is divided among the closest degree of surviving next-of-kin. Section 102 provides:

102. If an intestate dies leaving no spouse, issue, father, mother, brother, sister, nephew or niece, his estate shall be distributed equally among the next of kin of equal degree of consanguinity to the intestate, and in no case shall representation be admitted.

Degrees of consanguinity are determined according to the civil law, by counting upwards to the nearest common ancestor and downwards to issue. Each generation counts as one degree.[45] This rule is codified in section 103 which provides in part:

103. For the purpose of this Part, degrees of kindred shall be computed by counting upward from the intestate to the nearest common ancestor and then downward to the relative.

Even in these times of computer records, tracing next-of-kin can be a laborious and time-consuming undertaking. In *Re Trembley*,[46] it was held that proof of kinship should be furnished by some capable person, based upon local registers or the testimony of a reliable member of the community. There is no limitation on how many generations must be searched to find the deceased's nearest surviving next-of-kin. It is possible, therefore, for the deceased's estate to devolve upon a relative or relatives the deceased never met or knew.

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[43] *Lewin* v. *Lewin*, (1904) 36 N.B.R. 365 (C.A.); *Re Powell*, (1921) 30 B.C.R. 134; *Blackborough* v. *Davis*, (1701) 1 P. Wms. 41, 24 E.R. 285.

[44] *Administration Amendment Act*, S.B.C., 1919, c. 1.

[45] *Re Kroesing*, [1928] 1 W.W.R. 224, [1928] 1 D.L.R. 643 (Alta. S.C.); *Doe D. Wood* v. *Deforrest*, (1883) 23 N.B.R. 209 (C.A.); *Re Cromarty*, [1937] 2 W.W.R. 682, 51 B.C.R. 531 (B.C.S.C.); *Re Robinson*, [1941] 2 W.W.R. 86 (B.C.S.C.).

[46] [1936] 2 W.W.R. 45 (Sask. S.C.).

5. Representation

The *Estate Administration Act* provides that in certain cases the issue of a deceased next-of-kin stand in his place and may share the property to which he would have been entitled had he survived. This is known as "representation." A deceased's grandchildren may take by representation,[47] as may a deceased's nephews or nieces.[48] But children of deceased nieces and nephews may not take by representation,[49] nor may issue of other more remote deceased next-of-kin.[50] In no case may the spouse of a deceased next-of-kin take by representation.[51] By way of contrast, under the *Wills Act* a testamentary gift to a beneficiary who predeceases the testator may devolve upon the beneficiary's spouse.[52] Such a refinement is probably unnecessary for the purposes of intestate succession. The *Wills Act* provision is designed to avoid partial intestacies. Moreover, if a beneficiary predeceases the testator, there is no guarantee that the deceased's next-of-kin is more deserving than the beneficiary's spouse or children. Arguably the *Wills Act* corresponds to what many testators intend. A gift to a beneficiary may well have been intended to benefit that beneficiary's family. With respect to intestate succession, it is difficult to raise a convincing argument that the spouse of a deceased next-of-kin should be preferred over other next-of-kin of the intestate.

A person entitled to take by representation has no better claim than the one he represents. In *Re Lewis*,[53] grandchildren could not be admitted to their father's distributive share unless they accounted for his advancements, as he would have been required to do had he survived.

6. Kindred and Half Blood

No distinction is made between next-of-kin of the whole blood and next-of-kin of the half blood.[54] They inherit equally. Jowitt defines these relationships as follows:[55]

> Blood is of two kinds—the whole blood and the half blood . . . One person is said to be of the whole blood to another when they are both descended from the same pair of ancestors, *e.g.*, two brothers who have the same father and mother . . . Two persons are said to be of the half blood to one another when they are descended from one common ancestor only, *e.g.*, two brothers who have the same father, but different mothers.

Section 103 codifies the common law. The relevant part of that section provides:

> The kindred of the half blood shall inherit equally with those of the whole blood in the same degree.

In *Re Jensen* it was observed:[56]

> The statute [of Distribution, 1670] itself is silent on the point but it was held under it in *Watts* v. *Crooke* that those of the half blood take equally with those of the whole blood. In *Jessup* v. *Watson*, it was held that brothers and sisters of the half blood through the mother take equally with brothers and sisters of the whole blood.

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[47] Section 96(4); *see Re Kennedy*, (1911) 40 N.B.R. 437.

[48] Section 100.

[49] Section 101; *Re Drain*, [1948] 1 W.W.R. 280, [1948] 2 D.L.R. 617 (B.C.S.C.); *Re Beaulieu*, [1951] 4 D.L.R. 687 (B.C.S.C.); *Re Minor*, (1944) 61 B.C.R. 401, [1945] 3 D.L.R. 474 (B.C.S.C.); c.f. *Re McIver*, [1941] 3 W.W.R. 849, 57 B.C.R. 139 (B.C.S.C.); *Carter* v. *Patrick*, [1935] 1 W.W.R. 383 (1935) 49 B.C.R. 411, (1935) 2 D.L.R. 811 (B.C.S.C.); *Re McKay*, (1927) 39 B.C.R. 51 (B.C.S.C.).

[50] Section 102.

[51] *Re Forgie*, [1948] 1 W.W.R. 793, 56 Man. R. 56, [1948] 3 D.L.R. 329 (Man. K.B.); *c.f. Re Gouge*, (1937) 52 B.C.R. 544, (1938) 2 D.L.R. 800, [1938] 1 W.W.R. 832.

[52] *Wills Act*, R.S.B.C. 1979, c. 434, s. 29.

[53] (1898) 29 O.R. 609.

[54] Section 103.

[55] *The Dictionary of English Law*, (2nd ed. 1977) 230.

[56] [1926] 3 W.W.R. 737, [1927] 1 D.L.R. 76 (Alta. S.C.), *per* Walsh J. at 740; *see also Johnston* v. *Lineker*, (1936) 50 B.C.R. 508, (1936) 4 D.L.R. 435 (B.C.C.A.), *affirming* (1936) 50 B.C.R. 378, [1936] 1 W.W.R. 393.

It is possible for next-of-kin to have descended from two sets of ancestors in common with the deceased.[57] In *Re Adams*[58] the intestate's next-of-kin were cousins. One of them, E., was the niece of both the deceased's father and mother. The court was asked whether E. was entitled to any greater share than the others by reason of her being a "double cousin." Meredith J. said:[59]

> Under the Devolution of Estates Act all the property in question is to be distributed as personal property is now distributable. And among collateral relatives in the same degree of kinship it is so distributable equally. They take in their own right, not by way of representation. And there is no question of quantity or quality of blood; those of the half blood take equally with those of the whole blood; and those of the double blood—if I may so name a relationship, in the same degree, on the part of both father and mother—take no more, for all are akin to the intestate, and all in the same degree of kinship.

The British Columbia *Estate Administration Act* once provided an exception for ancestral property, which could be inherited on an intestacy only by next-of-kin of the whole blood.[60] This exception was repealed in 1925 when the Act was amended to make intestate succession to real property subject to the same rules which governed personal property.[61]

The current section 103 of the *Estate Administration Act* conflates two distinct concepts. It provides the manner in which degrees of kindred are to be computed. It also provides that no distinction is made between kindred of the whole and of the half-blood. As a matter of drafting, section 103 should probably be divided into two sections. The drafting of section 103 follows the drafting of the equivalent section in the Uniform *Intestate Succession Act*. We will make no recommendation on redrafting section 103, but we raise this point for consideration by Legislative Counsel.

7. Special Rights

Section 107 of the *Estate Administration Act* abolishes the rights of dower and of curtesy. Dower was the widow's right to the third part of the real property owned by her husband when he died.[62] Curtesy was the husband's right to a life estate in the real property owned by his wife at her death.[63]

In 1972 the *Estate Administration Act* was amended to give the surviving spouse a life estate in the matrimonial home. Sections 108 and 109 of the *Estate Administration Act* provide as follows:

> **Matrimonial home and household furnishings to spouse**
>
> **108.** (1) In this section and section 109
>
> "matrimonial home" means
>
> (a) a parcel of land shown as a separate taxable parcel on a taxation roll for the current year prepared under the *Taxation (Rural Area) Act* or on a real property tax roll for the current year prepared by the collector of a municipality, and that has as improvements situated on it a building assessed and taxed in the current year as an improvement, in which the deceased and his spouse were ordinarily resident, owned or jointly owned by the deceased, and not leased to another person; or
>
> (b) a share owned or jointly owned by the deceased in a corporation the memorandum of association of which stipulates that a building owned or operated by the corporation shall be owned and operated exclusively for the benefit of shareholders in the corporation who are occupants of the building, where the value of the share is equivalent to

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[57] *Re Adams*, (1903) 6 O.L.R. 697 (H.C.); *Troop* v. *Robinson*, (1911) 45 N.S.R. 145 (C.A.).

[58] *Ibid.*

[59] *Ibid.* 698-9.

[60] R.S.B.C. 1924, c. 5, s. 126. *See Re Parshalle Estate*, (1930) 42 B.C.R. 413, (1930) 3 D.L.R. 438, [1930] 1 W.W.R. 767 (B.C.C.A.).

[61] S.B.C. 1925, c. 2.

[62] Jowitt, *supra*, n. 55, 657.

[63] *Ibid.*

the capital value of a suite owned by the corporation, in which suite the deceased and his spouse were ordinarily resident, and which was not leased to any other person;

"household furnishings" means chattels usually associated with the enjoyment by the spouses of the matrimonial home.

(2) Notwithstanding section 107, and in addition to any other provision in this Part, but subject to section 111, in an intestacy.

(a) except where the matrimonial home would otherwise go under this Part to a surviving spouse, the matrimonial home shall devolve to and become vested in those persons by law beneficially entitled to it, and, subject to the liability of the land comprising the matrimonial home for foreclosure or the payments of debts, those persons by law beneficially entitled to it shall hold the matrimonial home in trust for an estate for the life of the surviving spouse, or so long as the surviving spouse wishes to retain the estate for life; and

(b) the household furnishings shall go to the surviving spouse.

(3) This section applies to the estate of a person who dies on or after April 1, 1972.

Contiguous land not incidental to matrimonial home

109. Where, on application by any person who is, but for section 108, entitled to a share in the distribution of the matrimonial home, it is shown that any land contiguous to the matrimonial home could not reasonably be regarded as contributing to the use and enjoyment of the matrimonial home as a residence, the court may decrease the size of the parcel of land that devolves to and becomes vested in those persons by law beneficially entitled to it under section 108.

Section 109 gives the court a jurisdiction to determine what portion of the land, upon which the matrimonial home is situated, is necessary to the enjoyment of the home. That portion of the land not necessary for the enjoyment of the matrimonial home, the court may remove from the trust in favour of the surviving spouse.

It is not clear that section 109 achieves acceleration of the interests of those next entitled. Under section 108 the interests of those beneficially entitled to the land have already vested, subject only to a life estate in favour of the surviving spouse. Section 108 does not deprive any person of a share in the distribution of the matrimonial home. It postpones vesting in possession, not vesting in interest. However, section 109 permits only those beneficiaries to apply who have been deprived of a share in the distribution by section 108. It is not clear, therefore, whether the court's power under section 109 to "decrease the size of the parcel of land" subject to the trust will permit the court to vest those beneficiaries with possession of land contiguous to matrimonial property which is not necessary for the enjoyment of the home as a residence.

8. Escheat and Bona Vacantia

If next-of-kin cannot be located, real property owned by the deceased at the time of his death escheats to the Crown. Personal property of the deceased would go to the Crown as *bona vacantia* ("ownerless goods"). Under the common law, the property of an illegitimate person escheated to the Crown if no issue survived him.[64] This has been modified by legislation which makes an illegitimate child the legitimate child of his or her natural mother.

The *Escheat Act* provides for the administration of both escheated real property and personal property received by the Crown *bona vacantia*. The Crown may transfer an interest in land or in personal property to any person having a legal or moral claim upon the person to whom the property belonged.

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[64] *Re W., supra*, n. 36; *Re Hamilton*, (1948) 28 M.P.R. 53 (N.B.) (collaterals of a mother of an illegitimate intestate could not inherit).

An escheat to the Crown is always subject to debts of the estate.[65] As far as we are aware, the practice of the Ministry of the Attorney General is to approach these questions flexibly.

9. Advancement

Money given by the deceased during his lifetime to one of his surviving children may be characterized as an advancement of the child's intestate portion. In calculating the share to which that child is entitled, the amount advanced to him must be deducted from his interest in the intestacy.[66] This is known as "hotchpot." Section 105 provides:

> **Advances to children**
>
> **105.** (1) Where any child of a person who has died wholly intestate has been advanced by the intestate by portion, the portion shall be reckoned, for the purposes of this section only, as part of the estate of the intestate distributable according to law. If the advancement is equal to or greater than the share of the estate which the child would be entitled to receive as above reckoned, the child and his descendants shall be excluded from any share in the estate; but if the advancement is not equal to the share, the child and his descendants are entitled to receive so much only of the estate of the intestate as is sufficient to make all the shares of the children in the estate and advancement equal as nearly as can be estimated.
>
> (2) The value of any portion advanced shall be deemed to be that which has been expressed by the intestate or acknowledged by the child in writing, otherwise the value shall be the value of the portion when advanced.
>
> (3) The onus of proving that a child has been maintained or educated, or has been given money, with a view to a portion is on the person so asserting, unless the advancement has been expressed by the intestate, or acknowledged by the child, in writing.

The precursor to this section is contained in section 5 of the English *Statute of Distribution, 1670*. The effect of that section has been described as follows:[67]

> The intent of the statute was to make the provisions for all the children of the intestate equal, as far as could be estimated. Accordingly, section 5 [of the Act of 1670] provided that no child of the intestate, except his heir-at-law, who should have any estate in land by the settlement of the intestate, or who should be advanced by the intestate in his lifetime by pecuniary portion, equal to the distributive shares of the other children, should participate with them in the surplus; but if the estate so given to such child by way of advancement was not equivalent to their shares, then that such part of the surplus as would make it so should be allotted to him or her.
>
> This provision applied only to the distribution of the estates of intestate fathers.
>
> The statute took nothing away that had been given to any of the children. A child was not bound to bring advances into account unless he elected to claim his distributive share.
>
> Section 5 applied only to the case of total intestacy. Where there was a partial intestacy, a child did not have to bring advances into hotchpot. . . .
>
> If a child, who received an advancement from his father, died in his father's lifetime, leaving children, such children were not admitted to their father's distributive share, unless they brought in his advancement; since, as his representatives, they could have no better claim than he would have had, if living.

Section 105(3) of the British Columbia Act provides that the onus of proving an advancement is on the person asserting it, unless the deceased expressed that a payment was an advancement or the child acknowledged the advancement in writing. In some jurisdictions possessing similar legislation, it has been held that an advancement cannot be proved unless the deceased

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[65] *Re Butterworth*, [1920] 1 W.W.R. 852, 15 Alta. L.R. 284, 51 D.L.R. 474 (C.A.).

[66] *Re Lewis*, (1898) 29 O.R. 609 (H.C.); *Akerman* v. *Akerman*, [1891] 3 Ch. 212; *Re Booth*, (1905) 6 O.W.R. 503 (W.C.); *Re Bells*, [1919] 2 W.W.R. 924 (Sask. C.A.).

[67] Williams & Mortimer on *Executors, Administrators and Probate*, (Fifteenth ed., 1970), 883; *see also* Abbas Mithani, "The 'Hotchpot' Rules Revisited," Law Society Gazette, June 23, 1983.

expressed that it was an advancement or it was evidenced in writing.[68] In British Columbia there is a presumption that the giving of large sums constitutes advancement by portions.[69] The onus of proof in these circumstances, therefore, shifts from the person asserting that a payment was an advancement to the person who received it. He must rebut the presumption that a large payment to him was an advancement, notwithstanding the lack of any other evidence suggesting it was an advancement.

10. Partial Intestacies

If the deceased prepares a will which is ineffective to dispose of the whole of his estate, that portion not governed by the will passes on an intestacy. Section 106 provides:

> **Estate undisposed of by will**
>
> **106.** All the estate not disposed of by will shall be distributed as if the testator had died intestate and had left no other estate.

This section may have the unintended result of benefiting beneficiaries twice.[70] For example, the testator may leave the bulk of his estate to his wife, while making a substantial gift to a beneficiary who predeceases the testator. If the testator neglects to include a clause distributing the residue of his estate, the gift will benefit the surviving spouse on an intestacy notwithstanding that the testator had carefully considered the spouse's interest and made adequate provision. In *Re Johnston*[71] the testator gave a life estate to his widow with a remainder to his brothers and sisters "who may then be living" at his wife's death. None of the testator's brothers and sisters survived the widow. As a result the gift lapsed. When the widow died an issue arose concerning entitlement to the remainder interests then in force. Since the gift had lapsed, the widow was entitled to it. The property, therefore, went to her next-of-kin, rather than to the kin of the testator or of his intended beneficiaries.

Some jurisdictions have enacted legislation to provide that a surviving spouse who is entitled to an interest under a will is not entitled to the preferential share on a partial intestacy.[72] In British Columbia the surviving spouse is entitled to the preferential share on a partial intestacy.

11. Contracting Out

Rights of succession under the *Estate Administration Act* may be waived by contract or otherwise. *Inter vivos* agreements concerning succession contained in marriage settlements[73] and in separation agreements[74] have been held to be effective waivers of rights to succeed on intestacy.

12. Costs

The usual rule is that costs of a court application respecting the administration or distribution of an intestacy are paid out of the estate. Nevertheless, parties bringing frivolous or vexatious actions may be liable for costs. In *Re Cleveland*[75] the deceased's next-of-kin unsuccessfully contended that

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[68] *Re Hall*, (1887) 14 O.R. 557 (C.D.); *Filman* v. *Filman*, (1869) 15 Gr. 643.

[69] *Blakeney* v. *Seed*, [1939] 1 W.W.R. 321, 53 B.C.R. 335, [1939] 2 D.L.R. 287 (B.C.S.C.).

[70] *Re Turnbull*, (1906) 11 O.L.R. 334 (H.C.).

[71] [1968] 1 O.R. 679, 67 D.L.R. (2d) 396 (H.C.).

[72] *Re Harrison*, (1901) 2 O.L.R. 217 (H.C.); *Re Jeffrey*, (1922) 23 O.W.N. 180 (H.C.); *see also* Ont. *Succession Law Reform Act*, R.S.O. 1980, c. 488, s. 45 (3).

[73] *Re Jutras*, [1932] 2 W.W.R. 533 (Sask. C.A.).

[74] *Re Jones*, [1950] 2 W.W.R. 313 (B.C.S.C.); *Re Dalton*, [1934] O.W.N. 691; *Re Rist*, [1939] 1 W.W.R. 518, [1939] 2 D.L.R. 644 (Alta. C.A.); c.f. *Jones* v. *Kline and Hoe*, [1938] 3 W.W.R. 65, [1938] 4 D.L.R. 391 (Alta. S.C.).

[75] (1891) 91 S.C.R. 78.

certain amendments to New Brunswick intestate legislation barred the surviving husband from sharing in his deceased wife's estate. Sir W.J. Ritchie C.J. said:[76]

> I am content to rest my judgment on the reasons given by the learned Chief Justice in the court below as I entirely concur in the conclusion at which he has arrived, except with reference to the costs; the defendant having gained the suit, and the court having held the property to be his, he should not, in my opinion, have been made to pay the costs, which was the practical result of saying the costs should come out of his estate. As a general rule when costs are awarded out of the estate it is in cases where the testator has so devised his property as to create ambiguities and mistakes as to the proper construction of his dispositions. In such a case the testator has himself really rendered an appeal to the court necessary. In this case the unfortunate defendant was in no way to blame, and having gained his suit I can see no good reason why he should be mulcted in costs. If now the costs are to come out of the estate he will have gained but a barren victory; in fact, he might as well have allowed this small estate to be divided among the next of kin as be obliged to divide it amongst the lawyers, more particularly as to the costs in this court, coming here after such a clear exposition of the law in the court below. I can only look upon this appeal as a mere experiment, and I agree with the learned judge in *Elliott* v. *Gurr* that "if parties will try experiments, and call in question rules clearly established by a uniform course of practice, they, and not the parties proceeded against, ought to be liable to the expenses. It is the duty of the court to check such novelties in practice by costs."

13. Time to Ascertain Shares

A legatee under a will has only a right to enforce the due administration of the estate. No vested right in the property of a testator can arise until administration of the estate is complete.[77] Similarly, next-of-kin take no more than an inchoate right pending administration. In *Ogilvie-Five Roses Sales Ltd.* v. *Hawkins*[78] a creditor sought to attach the debtor's beneficial interest in the estate of his intestate father. It was held that no person entitled under an intestacy had any legal or equitable proprietary interest in assets in the administrator's hands during the course of administration.

The justification for refusing to recognize an equitable proprietary interest in residual legatees or in next-of-kin is explained in *Commissioner of Stamp Duties* v. *Livingston*:[79]

> . . . it would have been in plain conflict with the basic conception of equity that to impose the fetters of a trust upon property, with the resulting creation of equitable interests in that property, there had to be specific subjects identifiable as the trust fund. An unadministered estate was incapable of satisfying this requirement. The assets as a whole were in the hands of the executor, his property; and until administration was complete no one was in a position to say what items of property would need to be realised for the purposes of that administration or of what the residue, when ascertained, would consist or what its value would be.

A next-of-kin's intestate share, arguably, may vest before administration is completed. The quote from *Commissioner of Stamp Duties* suggests that the interest of the residuary legatee or of the next-of-kin vests, not when administration is completed, but when the residue of the estate is ascertained.[80] Vesting cannot occur until all of the assets of the estate are identified and their value determined. Nevertheless, the value of the interests of the next-of-kin are to be determined at the date of death of the intestate.[81]

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[76] *Ibid.* 81-2.

[77] *Eastbourne Mutual Building Society* v. *Hastings Corpn.*, [1965] 1 W.L.R. 861, *Lall* v. *Lall*, [1965] 1 W.L.R. 1249; *Ogilvie-Five Roses Sales Ltd.* v. *Hawkins*, (1979) 4 E.T.R. 163 (Alta. T.D.); *Fitzgerald* v. *M.N.R.*, [1949] S.C.R. 453; *Re Hollebone*, 42 B.C.L.R. 132 (B.C.S.C.); *c.f. Re Servers of the Blind League*, [1960] 1 W.L.R. 564.

[78] *Ibid.*

[79] [1965] A.C. 694, 708, [1964] 3 All E.R. 692 (P.C.).

[80] *Re Pender*, [1921] 2 Ch. 59; *Barnardo's Homes* v. *Income Tax Special Commissioners*, [1921] 2 A.C.; M.A. King, "The Beneficiaries' Interest in Assets of an Unadministered Estate," (1979) 4 E.T.R. 163; *Re Hollebone supra* n. 77.

[81] *Collins* v. *The Toronto Gen. Tr. Corp.*, (1936) S.C.R. 37, *aff'g.* (1935) 50 B.C.R. 122, [1935] 3 D.L.R. 603 *aff'g.* (1935) 49 B.C.R. 398, [1935] 1 W.W.R. 295.

D. Reform

Intestate succession in British Columbia generally works well. It should be observed that the Uniform Law Conference of Canada has recently adopted in principle a different approach to determining next-of-kin, modelled after the (U.S.) *Uniform Probate Code*. It is a parantelic sysem with universal representation. Under that approach, the order of intestate successors is as follows:

(1) spouse and issue,
(2) parents,
(3) parent's issue,
(4) 1/2 to paternal grandparents or issue; 1/2 to maternal grandparents or issue,
(5) great grandparents and kin tracing through them are not entitled to share on an intestacy.

In our opinion, the current statutory determination of next-of-kin and of their intestate interests probably corresponds with what the community considers fair and equitable distribution. We see no reason to modify these rules. There are several matters, however, which we think require special consideration.

1. Dependant's Relief Applications on Intestacy

The scheme of intestate succession, or "statutory will," under the provisions of the *Estate Administration Act*, represents an attempt to provide for the deceased's family by distributing his estate in accord with the community's reasonable expectations of how moral obligations should be fulfilled. Nevertheless, no matter how detailed its provisions are made, it will remain a fixed scheme which cannot be tailored to individual needs. The amounts specified in the *Estate Administration Act* may be completely inadequate in an individual case.

In the event that provisions of a will are inadequate for the proper maintenance and support of a testator's spouse or children, they may apply to the court for a greater share of the testator's estate. In British Columbia the legislation under which a testator's spouse and children may apply for a greater share of the testator's estate is called the *Wills Variation Act*. That Act is discussed in greater detail in the next chapter.

Unlike the British Columbia *Wills Variation Act*, the *Uniform Dependant's Relief Act* applies to intestacies. As well, dependant's relief legislation in Ontario,[82] Alberta,[83] Manitoba,[84] Newfoundland[85] and Saskatchewan[86] extend rights of application to intestacies. Consequently, in those jurisdictions, if intestate distribution is inappropriate in particular circumstances, the courts have jurisdiction to vary it. We think this is a jurisdiction which British Columbia courts should be able to exercise as well.[87]

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[82] R.S.O., 1980, c. 488.
[83] R.S.A., 1980, c. F-2.
[84] R.S.M., 1970, c. T50.
[85] R.S. Nfld., 1970, c. 124.
[86] R.S.S., 1978, c. D-25.
[87] One concern we had was that extending *Wills Variation Act* principles to intestacies might increase the workload of the Office of the Public Trustee. We have been informed that, while undoubtedly these reforms will affect the Office of the Public Trustee, it is unlikely to be something they cannot handle. Most estates are not large enough to justify bringing an application on behalf of infant children. If an application is justified, one approach taken by the Public Trustee is to attempt to have a trust set up for children during their minority or the completion of their education. After that the trust terminates and the estate results to those originally entitled to it. In many cases this reasonable approach is agreed to by the parties without the need to resort to litigation. An additional concern relates to the effect such a recommendation would have on the current position that parties may waive rights to intestate succession. *Wills Variation Act* rights may not be waived. *See infra*, Chapter III.

It should be recognized that our present scheme of intestate succession possesses several attractive features which may be diminished by extending *Wills Variation Act* principles to intestacies. It provides a simple approach to determining next-of-kin, which results in fast and efficient administration of an intestate's assets. There is little scope for litigation to arise from a person dying intestate. These, of course, are reasons which would tell against permitting courts to vary the terms of a will under the *Wills Variation Act*.

In favour of extending *Wills Variation Act* principles to intestacies it should be observed that some people choose to die intestate. There is no functional difference between making a will which provides for the same distribution that would arise upon an intestacy, and dying intestate. There is no sense in providing that courts can vary the will but not the intestate scheme of distribution. If, in the circumstances, the scheme of distribution is unfair, the courts should have power to vary it, whether the deceased died testate or intestate.

The spectre of increased litigation is answered in part by the need to provide adequately for the deceased's family. If increased litigation is the price, we have concluded that in the interests of justice that price should be paid.

In the Working Paper, we proposed that the principles of the *Wills Variation Act* should apply to intestate estates. The majority of our correspondents agreed with this proposal, subject to defining the court's jurisdiction generally under the *Wills Variation Act* (the subject of Chapter III of this Report). One of our correspondents observed:

> I agree with this recommendation. It seems to me that it could be argued there is a greater justification for being prepared to vary a general statutory scheme of distribution (to which the deceased may never have turned his mind) than one specifically chosen by the deceased in his will.

Only one of our correspondents felt that the advantages of a fixed and certain system of intestate succession significantly outweighed the results achieved by a discretionary system, with its attendant litigation and uncertainty.

Several of our correspondents argued against extending the *Wills Variation Act* provisions to intestacies because a deceased who declines to make a will can expect no more than the statutory scheme:

> While perhaps the majority of our group had no strong opinion about the extension of judicial discretion to vary to cases of intestacy, there was a general concern that we should not as a community lose sight of the fact that, if a person foregoes the privilege of making a will, an intestacy distribution according to a listing is all that he can and should reasonably expect from society. We do not consider that it is either difficult or beyond the ability of any average person to make a short will concerning his assets.

We do not find this argument persuasive. The purpose of dependent's relief legislation has very little to do with the deceased's expectations. It is aimed at preventing injustice when a deceased fails to observe his obligations to his family.

We have concluded that the problems remedied by the *Wills Variation Act* are as likely to occur in intestate succession as in testate succession. The *Wills Variation Act* should be amended to govern both testate and intestate succession. The title of the *Wills Variation Act* should be amended to reflect this change. Alternatively, legislation respecting succession might be combined in an omnibus Act. That approach was taken by Ontario in their *Succession Law Reform Act*. Whether that approach should be taken, however, is not a substantive question. An advantage of that approach is that definition sections

need not be repeated in each Act. Moreover, it may be convenient for practitioners to refer to a consolidated Act rather than to a number of separate statutes. We received two submissions that opposed omnibus legislation on the ground that enough confusion was generated by the 1979 revision of British Columbia statutes. We suspect that by now that confusion has diminished considerably. The majority of our correspondents favoured consolidation of succession legislation. We leave the decision whether an omnibus Act would be desirable to Legislative Counsel, who is in a better position to determine whether that approach will facilitate drafting of the necessary legislation.

The Saskatchewan Act uses the following formula to extend dependant's relief principles to intestacies:

> Where an application is made under subsection 1 by or on behalf of a dependant of an intestate, then, for the purpose of this Act, the intestate shall be deemed to be a testator and to have provided by will for distribution of his estate as on an intestacy, and this Act shall be construed accordingly.

We think this is an effective method, and a similar provision could usefully be included in the British Columbia Act.

The Commission recommends:

1. That the principles of the Wills Variation Act *should apply to intestate estates.*

2. Spousal Share

In the Working Paper we identified two approaches to revising the surviving spouse's share on an intestacy. The first approach was to examine the basic concepts of intestate succession to see whether an alternative scheme may be more in keeping with expectations of the community respecting fair, just and equitable distribution. The second approach was to accept the present scheme, and make proposals designed to ensure that the spouse is as well protected today as when these provisions were first enacted. Response received on which approach should be adopted was divided.

(a) Entirety to Spouse

Extending *Wills Variation Act* principles to intestacies opens up an option which has a great deal of merit. Intestate legislation could provide that the entire estate goes to the surviving spouse. If, in rare cases, it would be appropriate to provide for other members of the deceased's family, the courts would have power to vary intestate succession under recommendation 1. An argument in favour of this approach is that statistical surveys indicate most testate estates, where the deceased is survived by spouse and issue, are left to the surviving spouse.

Some empirical research has been conducted to determine whether intestate schemes of distribution correspond to general expectations by considering distribution directed by will. In Illinois, a study[88] was conducted at a time when on an intestacy a surviving spouse received one-third of the estate and the children received the remaining two-thirds. A survey of 22 testate estates in which the testator was survived by spouse and children revealed that

[88] Allison Dunham, "The Method, Process and Frequency of Wealth Transmission at Death," 30 U. of Ch. L. Rev.

in every case all of the property was left to the surviving spouse. Commenting upon the results of this and other surveys, the report's authors stated:[89]

> We may now consider the implications of the analysis of wills for legislative reform of the laws concerning transmission of wealth at death. The most obvious conclusion is that the present statutory share of one-third of the estate for the surviving spouse, if there are children, is almost completely contrary to the expectations of the average testator. Both English surveys reached the same conclusion and the Illinois statutes concerning pensions for specialized employees are also in accord. A need for reform of the distribution statute as to the spouse's share seems obvious unless one is able to substantiate alternative conclusions: The intestate laws should deliberately deviate from normal expectations in order to induce people to make wills; or the expectation of the class of persons who make wills is not the same as the class of persons who do not make wills and the intestacy laws are for this latter group of persons.

We are indebted to the Ministry of Finance for providing us with information on estates probated in British Columbia. That Ministry was responsible for administering the *Succession Duties Act*. Pursuant to that Act, a deceased's personal representative was required to file with the Ministry information on the value of the estate and the entitlement of the deceased's heirs or next-of-kin. The last year in which succession duties were levied was 1977. At our request, detailed information concerning individual estates was randomly gathered (all files opened during a two day period in 1977 were examined). Of the almost 14,000 estates probated in 1977 we had access, therefore, to 222. That information is contained in Appendix F to this Report. While we acknowledge that this information is not conclusive, we suspect that it is indicative of distributions resulting in most testate and intestate estates. We have also examined files in the Vancouver Probate Registry representing applications for probate or grants of administration made in a two-week period in December, 1981. That information is to be found in Appendix G to this Report.

We concluded earlier that intestate succession should reflect community views respecting what would constitute fair distribution. Perhaps the most compelling evidence of community opinion in this respect is what a majority of testators direct. The information collected by the Ministry of Finance discloses that in almost 80% of those cases where the deceased made a will and was survived by both spouse and children, everything was left to the surviving spouse. Information gathered from the Vancouver Probate Registry corresponds to that finding. It should follow that to give effect to the collective view of the community as to what is fair, just and equitable, the surviving spouse should be entitled to the entire estate upon an intestacy.

There are several reasons why people tend to make wills which leave their entire estate to their spouse. First, often the efforts of the surviving spouse are a significant factor in the acquisition of property by the deceased spouse either by direct contribution, or by reason of services rendered to the family. The value of these kinds of contributions is recognized by the *Family*

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[89] *Ibid.* at 240-242. It is difficult to say, but it would appear that intestate succession, either pursuant to statute or the subject of informal division, is much more common than testate succession. It has been observed (Clark *et al.*, *Gratuitous Transfers*, (1977) at 65), for example, that:

> Any complete factual description of the effect on property of the death of the owner must take into account the cases where there are no court proceedings, as well as those where the property is administered and distributed, pursuant to a probated will or the intestate scheme, under the supervision of the probate court. Probate in the case of a will and court administration in all cases are generally legal prerequisites to the acquisition of marketable title by the successors of a deceased owner. But many people own little or no property at death or leave property in such form that the issue of the marketability of the title does not arise. In such cases, the surviving relatives no doubt frequently make an amicable division and avoid legal difficulties by never being brought into court. No nation-wide survey has been made, but studies of particular localities indicate that, in terms of the number of people dying in a certain period of time, the relative order of frequency is first, by a large margin, no court proceedings; second, intestate succession under court administration; and third, transfer by will.

Relations Act. Second, in order to maintain his or her standard of living, the surviving spouse will require the bulk of the estate. Third, if there are children of the marriage, the surviving spouse will tend to use the estate for their benefit. Fourth, the heirs of the surviving spouse will often be the deceased's children. Fifth, property left to the surviving spouse is subject to a "roll-over" of the deceased's spouse's interests in that property, which results in a deferral of tax on capital gains until the surviving spouse dies or disposes of the property. The immediate needs of the surviving spouse override the interests of the deceased's issue. Any prejudice to the deceased's issue will tend to be mitigated by the fact that they will be the deceased's ultimate heirs in the natural order of things. All of these reasons for leaving the entire estate to the surviving spouse apply equally to intestate succession.

In the Working Paper we said:[90]

> For these reasons we think that giving the entire estate to the surviving spouse is an attractive alternative to the current approach of the *Estate Administration Act*. Either the *Estate Administration Act* should be amended to provide that the surviving spouse is entitled to the entire estate, or the current approach to intestate succession should be retained provided several changes, which we discussed earlier, are made in order to bring intestate succession into step with contemporary needs. We have reached no firm view respecting which of these two options should be preferred.

The basic approach which should be taken to intestate succession has been carefully reconsidered by the Commission and a division of opinion has emerged. One member has concluded that an all-to-the-spouse approach should be adopted. His views are set out in the reservation following Chapter V.

A majority of the Commissioners reject that approach. In practical terms, the surviving spouse will receive the bulk of the estate, if the preference share is set at a realistic level. In large estates, there is no reason not to permit the deceased's issue to share, provided the surviving spouse receives a generous portion of the estate. For this reason, the majority has concluded that the basic scheme of intestate succession should be retained. There are, however, a number of ways in which the current legislation can be improved.

(b) Revising the Existing Legislation

(i) Preferred Share

In British Columbia, the surviving spouse is currently entitled, on an intestacy, to a preferred share of $65,000. The function of the surviving spouse's preferred share is to ensure that generous as well as adequate provision is made for the surviving spouse. By way of contrast, the Uniform *Intestate Succession Act* gives the spouse a preferred share of $20,000 only if the intestate leaves no issue. The Uniform *Intestate Succession Act* provides in that event, that the surviving spouse receives one-half of the balance of the estate and the deceased's next-of-kin receives the other half. This approach is abandoned in favour of the approach adopted in British Columbia, in the draft Uniform *Intestate Succession Act* recently approved in principle by the Uniform Law Conference of Canada.

These two differences from our Act represent significantly different policy decisions as to how the estate of an intestate should be distributed. In our opinion, the surviving spouse should be preferred over both children of the marriage and other next-of-kin. The preferred share is intended to give the surviving spouse most or all of a modest estate without disinheriting children

[90] At p. 51

of the marriage if the estate is large enough that to provide for them would not prejudice the interests of the surviving spouse.

The surviving spouse's preferred share was enacted in 1955.[91] It was then set at $5,000. This figure was increased to $10,000 in 1963,[92] to $20,000 in 1966,[93] and to $65,000 in 1983.[94] The Act was also amended in 1972[95] to give the surviving spouse a life interest in the matrimonial home. Difficulties of valuing a life interest aside, it must be acknowledged that the life estate plus a life interest in the matrimonial home, until recently, ensured that the surviving spouse was well provided for. By today's standards the sum of $20,000, notwithstanding the life interest in the matrimonial home, was grossly inadequate. Increasing the preferred share to $65,000 goes some way towards adequately providing for the surviving spouse. The Ontario *Succession Law Reform Act*, by way of contrast, raised the preferred share of the surviving spouse to $75,000.[96]

At one time $20,000 would ensure that the spouse received the bulk of the deceased's estate, including the matrimonial home. In British Columbia the peculiarities of the economy generally and of the housing market particularly make it very difficult to determine a figure which will protect a surviving spouse in the 1980's, and there is some doubt whether the current figure of $65,000 accomplishes that. In the Working Paper we tentatively proposed that the spouse's preferred share be increased to $100,000. On reconsideration, we have concluded that a larger sum is necessary to protect the surviving spouse. In our opinion the sum of $200,000 should be adequate protection for the present, provided the amount of the surviving spouse's preferred share is kept under review and increased periodically to mitigate inflation. The *Estate Administration Act* should be amended accordingly. A flexible means of ensuring that the amount of the preferred share remains sufficient, is to give the Lieutenant Governor in Council power to increase it by regulation. Care should be taken when increasing the spouse's preferred share in providing to which estates it is to apply. We have concluded that the date of the deceased's death should be determinative. An increase in the preferred share should apply to those estates where the deceased died after the regulation was promulgated.

(ii) Share of Residue

The surviving spouse shares in one-half of the residue if one child survives the deceased and in one-third of the residue if more than one child survive the deceased. In many cases a larger share of the residue may be required to maintain the spouse adequately, particularly if the spouse must continue to support children during their minority.

In British Columbia the spouse's entitlement to a preferred share, together with an interest of one-third or one-half of the residue of the estate (depending on the number of children who also survive the deceased) is intended to give the surviving spouse a generous portion of the estate. However, we do not think that in general that portion is generous enough. We have concluded that the spouse's share in residue should be increased to one-half regardless of how many children survive the deceased. This is the approach taken in the American *Uniform Probate Code*.[97] Increasing the

[91] S.B.C. 1955, c. 2, s. 3.
[92] S.B.C. 1963, c. 1, s. 5.
[93] S.B.C. 1966, c. 1, s. 11.
[94] S.B.C. 1983, c. 4.
[95] S.B.C. 1972, c. 3, s. 3.
[96] R.S.O. 1980, c. 488, s. 45.
[97] Section 2-102.

amount of the preferred share together with increasing the surviving spouse's residual share should bring the British Columbia intestate scheme more closely in accord with what we perceive to be the community's expectations respecting fair distribution of an intestate's estate.

The *Uniform Probate Code* distinguishes between the case where the intestate is survived by issue of the marriage, and the case where the intestate is survived by issue one or more of whom are not issue of the surviving spouse. In the first case the surviving spouse is entitled to a prior share before dividing the residue,[98] presumably because in these circumstances the surviving spouse will continue to accept responsibility for minor children and, upon the surviving spouse's death, such issue would be likely to inherit. In the second case the surviving spouse is not entitled to a prior share, and the estate is divided so that the surviving spouse receives one-half and the intestate's issue share equally in one-half.[99] Presumably, in the second case, the surviving spouse may not be responsible for the intestate's issue, nor would they necessarily inherit upon the surviving spouse's death. It is, therefore, appropriate to make separate provision for such issue.

While distinguishing between children of the marriage and children of previous marriages is an interesting refinement to intestate succession, it is a fixed and arbitrary solution which will not necessarily be appropriate in individual cases. We have concluded that it is not necessary to amend the British Columbia *Estate Administration Act* to take into account children of previous marriages. The majority of submissions received on this issue agreed. The possibility, however, that the British Columbia scheme of intestate succession may be inappropriate in these circumstances would be answered by recommendation 1, by extending to the courts power to vary intestate succession in appropriate circumstances.

The Uniform *Intestate Succession Act* provides that, if no issue survive the deceased, the surviving spouse takes a preferred share of $20,000 plus one-half the residue of the estate. The balance goes to the deceased's next-of-kin. This scheme of distribution differs significantly from what we perceive to be the expectations of the community as to a fair distribution of the estate of an intestate. Requiring the surviving spouse to share one-half the residue of the deceased's estate with the deceased's next-of-kin is sometimes referred to as the "doctrine of the laughing heir." Professor Oosterhoff makes the following observations concerning this doctrine:[100]

> Contrary to the former law [of Ontario] under which the surviving spouse would have to share part of the estate with the deceased spouse's next of kin, where no issue survived, the surviving spouse will now take all. This is indeed a most sensible reform, recommended by the Ontario Law Reform Commission to overcome the "doctrine of the laughing heir", that is, the remote next of kin with whom there has been no contact and who stands to make a windfall under the former legislation. It is, of course, arguable that this new rule may be unfair in cases where the marriage was of recent date and the assets going to the surviving spouse can be said to have derived from the family of the deceased spouse. The answer to that must be that the surviving spouse will be entitled to a preferential share of $75,000 in any event, and that to protect larger amounts from eager young widows (or widowers) the deceased should and, considering the size of his estate, could have made a will.
>
> Another argument against this change may be that it deprives the next of kin of the deceased who are in need of support. That argument too can be readily answered by the reply that the testator has a primary obligation to his spouse and issue. In the event that he has actual or moral obligations to his next of kin who are in actual need he should make a will to provide for them.

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[98] Section 2-102 (3).

[99] Section 2-102 (4).

[100] *Succession Law Reform in Ontario*, (1979), at 61-2.

The British Columbia Act followed these provisions of the Uniform *Intestate Succession Act* until it was amended in 1958.[101] In our opinion the current provisions of the British Columbia *Estate Administration Act* with respect to the share of the surviving spouse are more in keeping with the collective view of the community as to what is fair, just and equitable than those of the Uniform *Intestate Succession Act*.

The *Uniform Probate Code* takes a slightly different approach to the question of whether next-of-kin should share the estate with the surviving spouse. If the intestate dies without issue, but is survived by his parents, the spouse shares the residue of the estate with them.[102] This restriction avoids the danger that the surviving spouse's share will be reduced merely to provide a windfall to very distant next-of-kin. If it is desirable to make provision for the intestate's near next-of-kin, this kind of approach has much to recommend it. Confining next-of-kin to the intestate's parents, however, is an arbitrary decision. Including brothers and sisters of the intestate, for example, is equally defensible.

Nevertheless, we have concluded that this refinement is unnecessary, if not directly counter to common expectations. If the deceased is survived by his spouse, but no issue, the surviving spouse should take the entire estate. If, in isolated cases, this will not work fairly a court power to vary intestate succession as may be appropriate in the circumstances will remedy injustice.

The Commission recommends:

2. *(a) That section 96 of the* Estate Administration Act *should be retained, subject only to the following amendments:*

(i) The Estate Administration Act *should be amended to provide that the surviving spouse's preferred share be $200,000 or such other greater amount prescribed by the Lieutenant Governor in Council.*

(ii) The Lieutenant Governor in Council be given the power to increase by regulation the amount of the surviving spouse's preferred share.

(iii) If the deceased is survived by one or more children or their issue, the spouse is entitled to one-half the residue of the estate.

(b) That the Lieutenant Governor in Council regularly review the adequacy of the surviving spouse's preferred share, and in any event, no less often than every five years from implementation.

[*Note: These recommendations are subject to Recommendation 1.]

3. Illegitimate Children

Under the *Estate Administration Act*, illegitimate children are deemed to be legitimate children of their mother. No similar provision deems illegitimate children to be the children of their father and, therefore, they cannot inherit from their father. They are, however, entitled to maintenance, provided they have been supported by the father for more than one year prior to his death.

These matters were considered by the British Columbia Royal Commission on Family and Children's Law. They recommended:[103]

> The *[Estate] Administration Act* should be amended to permit inheritance from and through the father of a child born outside of marriage. The *Act* should allow recognized fathers to inherit from a child who dies intestate.

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[101] S.B.C. 1958, c. 2, s. 8.

[102] Section 2-102.

[103] Fifth Report of the Royal Commission on Family and Children's Law (B.C.), March, 1975, recommendation 27.

We agree in principle with this recommendation. In our opinion, an illegitimate child should have the same rights of succession enjoyed by legitimate children.

This conclusion gives rise to practical problems of determining the parentage of an illegitimate child. However, we are less concerned with cases where paternity is difficult or impossible to establish, than with the injustice of refusing to permit a child of a long standing and flourishing common law relationship to inherit from his undoubted father. In many cases paternity is acknowledged or never in issue. In such cases we do not believe it necessary to insist on, for example, medical evidence of paternity as a precondition to an illegitimate child inheriting from his father.

In Ontario, the distinction between legitimate and illegitimate children has been abolished. Section 1 (1) of the *Succession Law Reform Act* provides in part:

> 1.-(1) In this Act,
>
> (a) "child" means a child born within or outside marriage, subject to sections 86 and 87 of *The Child Welfare Act* (which relate to the effect of adoption), and includes a child conceived before and born alive after the death of the parent;
>
> (b) "grandchild" means the child of a child;
>
> (c) "issue" means any lineal descendant of a person, whether born within or outside marriage, subject to sections 86 and 87 of *The Child Welfare Act* (which relate to the effect of adoption), and includes issue conceived before and born alive after the death of the person;
>
> (d) "parent" means the father or mother of a child;
>
> (2) In this Act, and in any will unless a contrary intention is shown in the will, a reference to a person in terms of a relationship to another person determined by blood or marriage shall be deemed to include a person who comes within the description notwithstanding that he or any other person through whom the relationship is traced was born outside marriage.

Various other provinces have enacted legislation to permit an illegitimate child to inherit from his father. In Alberta, an illegitimate child may inherit from his father if he leaves no widow or legitimate issue, provided paternity has been acknowledged, or established to the satisfaction of a court of law.[104] In Saskatchewan, the rights of an illegitimate child are not so highly circumscribed. Section 17 of the Saskatchewan *Intestate Succession Act* provides in part:[105]

> (2) If a male person dies intestate, an illegitimate child of the male person shall be entitled to share in the estate as if he were the legitimate child of the male person, if a court of competent jurisdiction is satisfied:
>
> (a) that during the lifetime of the intestate, the intestate publicly or otherwise acknowledged that he was the father of the child; or
>
> (b) that at the time of the birth of the child the intestate was living with the mother of the child as her husband and that after the birth of the child, the intestate seemed to have accepted the child as his own.
>
> (3) If an illegitimate person dies intestate and his estate would, but for this subsection, escheat to the Crown, the estate shall pass to the father of the intestate as if the intestate were the legitimate child of the father, if a court of competent jurisdiction is satisfied:
>
> (a) that during the lifetime of the intestate, the father publicly or otherwise acknowledged that he was the father of the intestate; or
>
> (b) that at the time of the birth of the intestate, the father was living with the mother of the intestate as her husband and that after the birth of the intestate the father seemed to have accepted the intestate as his own child.

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[104] *Intestate Succession Act*, R.S.A. 1980, c. I-9, s. 15.

[105] R.S.S. 1978, c. I-13; for a recent discussion of this section, *see Locke* v. *Yuers*, (1981) 126 D.L.R. (3d) 575, (1981) 9 E.T.R. 318 (Sask. Q.B.), *rev'd.* on appeal [1982] 5 W.W.R. 732 (Sask. C.A.).

The Uniform Law Conference of Canada has considered the question of illegitimacy and has promulgated a Uniform *Child Status Act*. The text of that Act is contained in Appendix A to this Report. The Act abolishes the distinction between legitimate and illegitimate children, provides procedures for determining paternity, and defines circumstances where paternity will be presumed.

The U.S. *Uniform Probate Code* adds an additional refinement to whether a father may inherit from his illegitimate child. The Code provides that a father may inherit from his illegitimate child if paternity can be established, he has openly treated the child as his and has not refused to support the child.[106]

We have concluded that for the purposes of succession the rights of an illegitimate child should correspond to those of a legitimate child. Legislation in other jurisdictions, such as Saskatchewan, provides when paternity of an illegitimate child will be presumed. That legislation discloses a marked agreement that subsequent marriage to, or cohabitation with, the illegitimate child's mother, financial support and public acknowledgment are separate factors which may evidence paternity. The question of paternity, however, arises in many other contexts apart from succession, including, for example, the enforcement of *inter vivos* support obligations. We are reluctant to recommend special rules for establishing paternity which will arise only when succession rights are in issue. We think that establishing paternity should be subject to uniform rules notwithstanding the context in which the issue is raised. Consequently, we make no recommendation respecting this issue. It should be the subject of special study, in which all aspects of the question may be adequately considered.

There are two basic approaches to giving an illegitimate child succession rights. One approach is to provide that an illegitimate child is deemed, in certain circumstances, to be the legitimate child of his father. That approach follows the drafting of the *Estate Administration Act* with respect to the relationship between an illegitimate child and his or her mother. The drawback to that approach is that an illegitimate child cannot inherit from his or her parent's next-of-kin.

The second approach, taken by the Uniform *Child Status Act* and the Ontario *Succession Law Reform Act* is to provide that the rights of an illegitimate child are the same as those of a legitimate child. In that way an illegitimate child may inherit from relations traced through his parents. We prefer the second of these two approaches.

The Commission recommends:

3. That for the purposes of intestate succession, when determining kindred relationships, no distinction should be made between children of married or unmarried parents.

4. Protection of Personal Representative

Permitting illegitimate children to inherit as if they were legitimate may cause the personal representative difficulties. In many cases it may be difficult to locate illegitimate children. The Ontario *Estates Administration Act*[107] contains a provision defining the duties of the personal representative. It provides:

[106] Section 2-109.
[107] R.S.O. 1980 c. 143.

23.-(1) A personal representative shall make reasonable inquiries for persons who may be entitled by virtue of a relationship traced through a birth outside marriage.

(2) A personal representative is not liable for failing to distribute property to a person who is entitled by virtue of a relationship traced through a birth outside marriage where,

(a) he makes the inquiries referred to in subsection (1) and the entitlement of the person entitled was not known to the personal representative at the time of the distribution; and

(b) he makes such search of the records of the Registrar General relating to parentage as is available for the existence of persons who are entitled by virtue of a relationship traced through a birth outside marriage and the search fails to disclose the existence of such a person.

(3) Nothing in this section prejudices the right of any person to follow the property, or any property representing it, into the hands of any person other than a purchaser in good faith and for value, except that where there is no presumption or court finding of the parentage of a person born outside marriage until after the death of the deceased, a person entitled by virtue of a relationship traced through the birth is entitled to follow only property that is distributed after the personal representative has actual notice of an application to establish the parentage or of the facts giving rise to a presumption of parentage.

This section defines the duties of the personal representative in order to limit his risk in administering the estate. It also preserves the rights of illegitimate children not located before distribution to trace property they should have received. These provisions, in our opinion, are probably not necessary. Sections 23 (1) and (2) do not add or limit the personal representative's duty to act reasonably and in good faith. Moreover, relieving a personal representative who acts reasonably and in good faith would not affect any proprietary right to follow or trace property which may have arisen.

The section also limits the right of an illegitimate child, or one who asserts rights by virtue of his relationship to the illegitimate child, to follow or trace property to which he is entitled. If paternity is not established before the death of the deceased, only that property which has been distributed after the personal representative has received notice of an application to establish paternity may be followed or traced. We can see no reason for this limitation. If a person is entitled to an interest in property, he should be permitted to follow it at common law or trace it in equity, subject only to the defences at law or in equity available to the recipient of the property or its substitute. Moreover, it is difficult to see what significance actual notice to the personal representative can make respecting a claimant's rights to an interest in property. Any dispute respecting property will be between its recipient and the claimant. Notice to the personal representative can be significant only so far as he may be personally liable for distributing the property.

In our opinion, the law respecting proprietary rights should be neither codified nor restricted in legislation respecting succession. In the Working Paper, however, we concluded that legislation should be enacted to protect the personal representative from personal liability for failing to locate either an illegitimate child, who has an interest in the estate of the deceased, or one who claims through such an illegitimate child.

We also invited comment on whether the courts should be able to relieve a personal representative from personal liability for a breach of other administrative duties, and observed that we would probably pursue this issue in a subsequent project on probate practice and procedure.[108]

It would appear that the courts already have this jurisdiction under section 98 of the *Trustee Act*.[109] That section provides as follows:

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[108] Pp. 182-4 of the Working Paper.

[109] R.S.B.C. 1979, c. 414.

Jurisdiction of court to relieve trustee of breach of trust

98. If it appears to the court that a trustee, however appointed, is or may be personally liable for a breach of trust, whenever the transaction alleged to be a breach of trust occurred, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which he committed the breach, then the court may relieve the trustee either wholly or partly from that personal liability.

Although the *Trustee Act* does not define "trustee," in section 1 "trust" is defined as follows:

> "trust" does not mean the duties incident to an estate conveyed by way of mortgage; but, with this exception, the word "trust" includes implied and constructive trust, and includes cases where the trustee has some beneficial estate or interest in the subject of the trust, and the duties incident to the office of personal representative of a deceased person.

The British Columbia *Interpretation Act*,[110] provides as follows:

> (4) Where a word or expression is defined in an enactment, other parts of speech and grammatical forms of the same word or expression have corresponding meanings.

Consequently, a "trustee" would include a person who exercises duties incident to the office of personal representative of a deceased.

It should also be noted that, if the personal representative is concerned about distributing the estate because of the possibility of undiscovered next-of-kin, such as illegitimate children, he may apply to the court for directions. Two recent cases[111] suggest that sections 88 and 39 of the *Trustee Act*[112] confer only a very limited jurisdiction on the courts to resolve questions of administration that may arise. In any event, these sections are largely superfluous, since, under the Supreme Court Rules the court enjoys a broad jurisdiction to resolve these questions.[113]

It would not appear, therefore, that there is any need to provide additional protection for a personal representative who fails to locate an illegitimate child of the deceased.

5. Common Law Spouse

We have considered whether it is desirable to extend rights similar to those enjoyed by lawful spouses to common law spouses. The Alberta Institute has made the following observations with respect to dependant's relief legislation:[114]

> Men and women do live together outside of marriage. Certain statutes provide such persons with legal rights in limited circumstances. Strong arguments can be advanced both for and against extending legal rights to persons in these circumstances. We recognize that severe hardship may result from denying a right to apply to a man or woman who has co-habitated for a substantial period of time. On the other hand, both parties may have chosen to live together outside of marriage for the very reason that they did not wish the incidence of marriage to apply to their relationship. To permit an application would in some cases frustrate the initial intention of both parties when they entered into the relationship. It can also be argued that legislation should encourage persons to marry. To convey similar rights on persons who chose not to marry may not encourage marriage. We believe that the rights and duties of men and women living together outside marriage deserves special study. We now have a study in progress. We do not

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[110] R.S.B.C. 1979, c. 206, s. 28 (4).

[111] *Jones* v. *Public Trustee*, (1982-3) 12 E.T.R. 83 (B.C.S.C.); *Re Bailey*, (1982-3) 12 E.T.R. 242 (B.C.S.C.), both decisions of Taylor J.

[112] R.S.B.C. 1979, c. 414.

[113] *See Re King*, [1907] 1 Ch. 75; *Re Royale*, (1890) 43 Ch.D. 18 (C.A.); *Re Tate*, (1921) 30 B.C.R. 363 (B.C.S.C.); *Eggli* v. *Stewart*, (1952) 5 W.W.R. 164 (B.C.C.A.); *Re Arnold Estate*, (1955) 16 W.W.R. 129 (B.C.S.C.).

[114] Family Relief, Report No. 29, 1978, at 58.

think that we should decide whether or not to make any recommendation to extend the Family Relief Act to include these persons until our study on persons living together outside marriage is completed.

Two facets of common law relationships must be recognized. Unlike lawful marriage, it is unsafe to presume that the parties to a common law relationship intend to share property or to provide fully for each other. Moreover, a common law relationship is as likely to be casual and occasional as it is to be strong and enduring.

There is a need for judicial discretion in such circumstances, which is provided by section 86 of the *Estate Administration Act*. Section 86 provides:

> **86.** Where an intestate leaves surviving him in the Province a common law spouse or an illegitimate child, the court may order that there be retained, allotted and applied for the support maintenance and benefit of the common law spouse or of the illegitimate child, or both, so much of the net real or personal estate, or both, of the intestate as the court sees fit, to be payable in the manner the court directs.

As we observed earlier, this jurisdiction is very similar to that exercised by the court on an application under the *Wills Variation Act* in that it is designed to ensure the deceased recognizes his moral obligations to his common law spouse and illegitimate children. It differs in that it is confined to providing maintenance, and, therefore, depends upon the applicant's need, while the court's discretion under the *Wills Variation Act* is not so fettered. We have concluded that a power to grant discretionary shares in an estate should be consolidated in a single statute dealing with dependant's relief. We recommended therefore that the *Wills Variation Act* should govern intestate as well as testate succession. We will be returning to the question of whether common law spouses and illegitimate children should be entitled to apply under that Act in the next chapter. For the moment, we record only our conclusion that the provisions granting the court's discretion to provide for illegitimate children and surviving common law spouses should be deleted from the *Estate Administration Act*.

The Commission recommends:

4. That sections 85 to 89 of the Estate Administration Act *be repealed.*

6. Separated Spouse

The law favours reconciliation. The *Estate Administration Act* provides, therefore, that separation from the deceased by itself does not prevent the surviving spouse from taking on an intestacy. The rebuttable presumption under section 111, that spouses who live separate and apart for one year intend to remain living separate and apart, however, reflects a policy decision that the affairs of separated spouses who do not intend to reconcile should be finalized.

A period of separation of some duration suggests that it is unlikely the spouses will reconcile. While the one year period set by section 111 is arbitrary, it does provide a fixed time by which certain spousal obligations may be determined. Additionally, the arbitrary nature of section 111 is to a large degree mitigated because the presumption may be rebutted by establishing that the intention to separate was not mutual, or that the spouses intended to reconcile at some future time.

Section 111 also grants the courts a discretionary power to provide for a separated spouse from the deceased's estate, even if barred by the presumption from taking as the deceased's spouse. It is difficult to determine what criteria the courts consider when exercising this jurisdiction. The results of

some cases suggest that duration of the marriage alone is significant. The surviving spouse's need for maintenance, for example, is often not significant.

In our opinion, if such a discretion is desirable, it should be consolidated with the court's jurisdiction under the *Wills Variation Act*. It should be noted as well that since the enactment of section 111, spousal property rights have been altered significantly by the *Family Relations Act*. A separation agreement made by the spouses will trigger spousal entitlement to an undivided half interest in family assets as a tenant in common. It is questionable, therefore, how far it is necessary to retain this discretionary power in order to protect or provide for a surviving separated spouse. We will return to this question in the next chapter where we discuss who should be entitled to apply under the *Wills Variation Act* and in Chapter IV where we consider the relationship between rights to succession and rights to family property.

7. Next-of-Kin

The rules which determine the next-of-kin of a person who dies intestate function very well. As we noted earlier, however, the administrator may have to search through many generations before discovering the intestate's next-of-kin. Theoretically, this could be a laborious, time-consuming, and expensive undertaking.

Under the *Uniform Probate Code*,[115] the degrees of next-of-kin are limited to prevent remote relatives from tracing through great-grandparents. The *Uniform Probate Code* provides in part:[116]

> (4) If there is no surviving issue, parent or issue of a parent, but the decedent is survived by one or more grandparents or issue of grandparents, half of the estate passes to the paternal grandparents if both survive, or to the surviving paternal grandparent, or to the issue of the paternal grandparents if both are deceased, the issue taking equally if they are all of the same degree of kinship to the decedent, but if of unequal degree those of more remote degree take by representation; and the other half passes to the maternal relatives in the same manner; but if there be no surviving grandparent or issue of grandparent on either of the paternal or the maternal side, the entire estate passes to the relatives on the other side in the same manner as the half.

In the comment to this section it is said:[117]

> This section provides for inheritance by lineal descendants of the decedent, parents and their descendants, and grandparents and collateral relatives descended from grandparents; in line with modern policy, it eliminates more remote relatives tracing through great-grandparents . . . If the pattern of this section is not desired, it may be avoided by a properly executed will or, after the decedent's death, by renunciation by particular heirs under section 2-801.

The Law Reform Committee of South Australia[118] considered whether it was desirable to limit degrees of inheritance. They concluded that there should be no arbitrary cut-off point, arguing:[119]

> If there are only remoter issue then they take under the Statutes of Distribution. That is also the position in Western Australia and Victoria. The policy of the law has varied in various countries and at various times in this respect. For example, the ancient Brehon law in Ireland restricted it to a six generation group (see volume I of the *Gill History of Ireland* at page 50), but it seems to us that the claims of relatives of any degree should take priority over the Crown's claims by escheat or *bona vacantia*. All of the amendments which have been proposed to limit the degree of inheritance for this purpose seem to us to be purely arbitrary

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[115] National Conference of Commissioners on Uniform State Laws, 1969

[116] Section 2-103.

[117] *Ibid.*

[118] 28th Report, Relating to the Reform of the Law on Intestacy and Wills, 1974.

[119] At 8.

"cut-off" points which do not have any compelling logic to support them and that the amendments made by the other States to recognise the rights of descendants of deceased brothers and sisters to claim should be followed here.

In the Illinois survey mentioned earlier, an attempt was made to discover what people lacking close relations would anticipate or intend should happen to their property if they were to die intestate. It was said:[120]

> A final question that emerges from this study concerns the statutory treatment of relatives more distant than brothers and sisters. When there is no will, is there any justification for preferring these more distant relatives to the state or county by an escheat? It would appear here that decedents in this category are likely to have a will when they want to provide for deserving friends and charities, and in other cases they simply do not care what happens to their property.

There is no clear choice between benefitting distant relatives, who may be strangers to the deceased, and letting the estate escheat to the Crown. Probably most people would lean in favour of benefitting distant relatives over the Crown. However, practical considerations should limit how far an administrator must search for distant next-of-kin, particularly when it seems probable that the deceased simply did not care what happened to his property.

An early call for reform with respect to this issue is to be found in *Principles of the Law of Personal Property*, a 19th century monograph by Joshua Williams:[121]

> The descent of real estate to distant heirs, and the devolution of personalty to distant kindred, involve an amount of learning and litigation, the abolition of which would perhaps be desirable. The family and near relations of an intestate have generally claims upon his bounty, which ought not to be disappointed by the accident of his decease without making a will. But distant relatives have seldom any such claims, nor consequently any expectation of such claims being fulfilled. To withhold from them, therefore, that which they had never expected to enjoy, would not be to inflict a loss. Under the present system, the property of an intestate who has no near relations, is not infrequently frittered away in expensive contests between opposing claimants, or else it devolves unexpectedly upon persons who, for want of previous education, are unable to make use of it with benefit either to themselves or to the community. In a country so heavily burdened as our own, any addition to the public income, not having the pressure of a tax, would be a very desirable acquisition. Such an addition might, as it appeared to the author, be very properly made by the devolution to the public of the properties of intestates having none but distant relatives. The country in which a man has lived, and in which his property has been acquired, or at any rate protected, has certainly some claims upon him—claims which seem preferable to those of the man who, in the case of real estate, founds his title on his descent from the mother of the *most remote* male paternal ancestor of the intestate, or who claims a share in the personalty because he chances to be a survivor amongst the multitude standing in the fifth or sixth degree of a series of kindred which increases, as it grows distant, in geometrical progression.

One option for reform is to provide by legislation what efforts the deceased's personal representative should make to locate next-of-kin. For example, the administrator of the estate, whose reasonable efforts in the circumstances have failed to locate next-of-kin, might only be obliged to seek out next-of-kin of the deceased who fall within the general category of "near family." Any definition of "near family" must be to some extent arbitrary. If next-of-kin qualifying as "near family" were limited to the fourth degree of consanguinity, they would include a great great grandfather, a great uncle or a first cousin of the deceased. For next-of-kin more distant, the administrator would be required to do no more than advertise. This approach would ensure that those relatives the deceased is likely to have considered as family will be located. But for more distant relations, it would relieve the administrator from

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[120] *Supra*, n. 93, at 23.

[121] (18th ed., 1926) at 603-4.

time consuming and often fruitless duties. It would also protect the estate from being dissipated by what can be a very expensive undertaking.

We suspect that this is the approach an administrator is likely to adopt under the present law as a practical necessity. In the usual case, the administrator will make efforts to locate next-of-kin, including advertising for them. If no next-of-kin respond to these advertisements, the estate, after being converted into money, is held in trust for 10 years. If no next-of-kin surface within that period, the estate escheats to the Crown. Even after escheat, next-of-kin may apply to the Crown for their share of the estate. Legislation defining a personal representative's duties, therefore, is unlikely to change how estates are administered. It would protect the administrator from liability for breach of trust in circumstances where duties with respect to locating next-of-kin presently placed upon him are particularly onerous. Additionally, it would remove the need for *pro forma* applications for directions to the court. While there is some merit to this approach, we have concluded that it does not go far enough.

We have consulted with the Office of the Public Trustee on this question, and we are informed that seldom, if ever, will an intestate estate devolve upon next-of-kin more distant than the fourth degree of consanquinity. Usually nearer next-of-kin survive the deceased. If that is not the case, it is usually impossible to locate more distant next-of-kin. Next-of-kin are unlikely to be discovered through advertisement.

Limiting next-of-kin entitled to succeed on an intestacy to those of the fourth degree of consanguinity or closer, would result in several advantages. Because when next-of-kin more distant than the fourth degree of consanguinity are entitled to succeed, seldom, if ever, can they be located, administrative convenience would be promoted without prejudicing interests of next-of-kin more distant than the arbitrarily determined cut-off. Although theoretically this approach might prejudice distant next-of-kin, in practice that should not occur. This approach would permit estates to escheat to the Crown without waiting 10 years.

Limiting next-of-kin entitled to succeed on an intestacy would not affect the rights of those people entitled to take by representation (the deceased's issue, and nephews and nieces). This approach affects only collateral relations.

The *Escheat Act* provides for the restoration of escheated property to any person having a "legal or moral" claim upon the former owner. We are informed that, as a matter of policy, every claim made under the Act is treated as a moral claim, so what constitutes a "legal" claim is, in practice, undefined.

A large measure of discretion is involved with respect to applications for escheated property that formed part of an intestate's estate. Apparently, the claimant must show some special relationship with the former owner, such as dependency or an intention on the part of the former owner to benefit the applicant. The applicant need not be next-of-kin to the former owner. We are advised of one case which involved an imperfectly executed will. The applicant had been the sole beneficiary under the will but had signed as a witness. The result was an intestacy and an escheat. The Crown restored the property to the applicant. Care should be taken that legislation limiting next-of-kin entitled to share on an intestacy does not foreclose their legal or moral rights to share in escheated property. We have concluded that this approach should be adopted.

The Commission recommends:

5. (a) That the Estate Administration Act *be amended to provide that next-of-kin more distant than the fourth degree of consanguinity to the deceased should not be permitted to share in the deceased's estate upon an intestacy.*

(b) Paragraph (a) does not prejudice the right of

(i) issue of the deceased to succeed on an intestacy, or

(ii) a person to apply under the Escheat Act *on the basis of a legal or moral claim upon the former owner of an estate that has escheated to the Crown.*

8. Representation

It has long been settled that no collaterals other than nephews and nieces can take by representation.[122] We can see no reason to extend rights to representation.

With respect to the right of issue of the deceased to inherit by representation, one change might be made. For example, only grandchildren may survive the deceased. The present scheme of distribution would divide the estate *per stirpes* among the grandchildren. Yet, since they are all of equal degree, it is arguable that a fairer form of distribution is *per capita*. With this problem in mind, the Ontario *Succession Law Reform Act* provides:[123]

> 47.-(1) Subject to subsection 2, where a person dies intestate in respect of property and leaves issue surviving him, the property shall be distributed, subject to the rights of the spouse, if any, equally among his issue who are of the nearest degree in which there are issue surviving him.
>
> (2) Where any issue of the degree entitled under subsection 1 has predeceased the intestate, the share of such issue shall be distributed among his issue in the manner set out in subsection 1 and the share devolving upon any issue of that and subsequent degrees who predecease the intestate shall be similarly distributed.

The Queensland Law Reform Commission considered this provision and said:[124]

> . . . a strict application of the *per stirpes* rule (which is the present Queensland provision) allows grandchildren in such a case to take between them only the share which their parent would have taken if he had survived the intestate. We are not satisfied that such an unequal distribution is warranted where all the persons entitled to share in the intestate's estate are of the same degree: in that case we consider that they should all take equal shares. We, therefore, recommend that the nearest surviving issue of the intestate shall take in equal shares and the more remote by representation.

In our Working Paper on Interpretation of Wills, we proposed a similar approach to this problem in the context of testate succession:

> The *Wills Act* be amended to provide that subject to a contrary intention, a gift to a class designated as "issue" of a person or by another term denoting descendant kin, thus encompassing more than one degree or generation, shall be distributed in equal shares among the nearest issue of that person and among remoter issue of that person *per stirpes* throughout.

The language used in that proposal reflects technical differences between testate and intestate succession. For example, the term *per stirpes* has the same meaning as "representation" except that "representation," technically, applies to *per stirpital* distribution upon an intestacy. Our proposal in the Working Paper on Interpretation of Wills was designed to resolve certain

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[122] A. H. Oosterhoff, *Succession Law Reform in Ontario*, (1979), 69, citing *Crowther* v. *Cawthra*, (1882) 1 O.R. 128 (Ch.D.); *Re Hale*, (1916) 10 O.W.N. 376 (H.C.); *Re Weaver*, [1950] 4 D.L.R. 357 (O.H.C.).

[123] R.S.O. 1980, c. 488.

[124] Queensland Law Reform Commission, Report No. 22, "On the Law Relating to Succession," 22-3.

problems of interpretation which arise in the context of wills. That proposal was designed to remove ambiguity with respect to the generation in which *per stirpital* distribution should begin, by providing that nearest surviving issue take in equal shares.

Response received on this issue was divided. Several of our correspondents argued that the fairest form of distribution in these circumstances was *per stirpital:*

> In my experience, about 90% of testators whose minds are directed to the problem choose to leave their estates to their grandchildren per stirpes and not per capita. If one or more children are alive when the will is made, and the testator does not wish to bypass them, I would increase that estimate to 100%. The Commission's proposal means that if only one child survives to take a share, the shares taken by children of deceased children are determined per stirpes and if none of the testator's children survive him, the grandchildren take per capita unless a contrary intention appears. In some cases a contrary intention may be self-evident: in others it may not be so clear. I know of no law which presumes a stirpital distribution (except on intestacy) and each case has to be decided on the language of the will. If there is nothing to show that a stirpital distribution is intended, either a per capita or a "joint tenancy" distribution will apply, depending upon the language used.
>
> In the case of an intestacy the beneficiaries are determined as of the date of death and there is no expression of intention. I see no reason why the share of a grandchild should depend on whether one of his uncles or aunts (children of the deceased) survived the intestate or not. On the contrary, the grandchild should receive what he probably would have received from his parent if his parent had survived the deceased. The same should apply to nephews and nieces. Proposal 7 strikes me as being inconsistent, haphazard and potentially unfair.

The arguments in favour of either approach are equally balanced, and preference is largely a subjective matter. The Commission has concluded that amendment of the current law is not called for.

9. Advancement/Hotchpot

The statutory requirement that a child of the deceased must account for portions advanced to him by the deceased during the deceased's lifetime is patterned after equitable doctrines. Had the deceased left a will, the courts would, in the absence of contrary direction, construe a gift to a child to be subject to the rule that portions advanced during the deceased's lifetime should be deducted from the child's share. This is known as the doctrine of advancement or "hotchpot." The purpose of hotchpot is to ensure fair distribution of the deceased's assets among his children by treating an *inter vivos* gift as if it were a testamentary disposition.

It might well be argued that a provision of this nature is more important in intestate than testate succession. Had the testator made a will and been concerned that during his lifetime he had preferred one child over another, he could make directions in the will to redress the imbalance. Having neglected or failed to make a valid will, his intentions cannot be determined, and the law should strive to distribute his estate fairly.

The Law Reform Committee of South Australia[125] agreed with the policy of the doctrine of advancement. In order to resolve the numerous, sometimes irreconcilable, decisions on advancement, they recommended abolishing the whole of the law of hotchpot and redefining it. Any gift received by next-of-kin other than the surviving spouse, within five years prior to the death of the deceased, should be taken to be in satisfaction or part satisfaction of the recipient's share under the intestacy.

We are not persuaded by the fundamental policy of hotchpot, and think that hotchpot should be abolished. The function of the *Estate Administration*

[125] *Supra*, n. 118 at 9.

Act is to distribute what remains of the testator's estate after his death, not to remedy any injustices which may have occurred during his lifetime. Ontario, which is the Canadian jurisdiction to have most recently considered wills and succession, did not re-enact a section requiring hotchpot.

Recommendation 1, granting the courts discretionary power to alter the intestate scheme of distribution to achieve just and equitable results, should provide a remedy for individual cases in which the abolition of hotchpot may operate unfairly.

The Commission recommends:

6. That the doctrine of hotchpot should not apply to intestacies. The Estate Administration Act *should be amended by repealing section 105.*

10. Special Rights

(a) Life Interest in the Matrimonial Home

The Commission has, for reasons which follow, concluded that the life estate in the matrimonial home in favour of the surviving spouse should not be retained.

(b) The Life Interest in the Matrimonial Home Causes Administrative Problems

The surviving spouse's life interest in the matrimonial home granted under the *Estate Administration Act* is equitable in nature. Those intestate successors entitled to the matrimonial home hold it in trust for the surviving spouse. Consequently, title to the property would be registered in the names of the intestate successors entitled to it. The surviving spouse's life interest would be registered either as a charge or a trust. If the property is conveyed, it would be conveyed subject to that registered charge or trust.

The court's power to limit that portion of the property subject to the trust does not entail subdividing the property. The court's power is to define what portion of the legal estate should be subject to the equitable interest in favour of the surviving spouse. If the court determines that a portion of the property need not be subject to the trust, the intestate successors entitled to it would have possession or use of that portion. They could not sell it as a separate piece of land, however, unless it were capable of being subdivided or strata-titled like any other property in British Columbia.

Various questions may arise concerning responsibility for expenses including taxes, levies, rates and payments of principal and interest on charges or encumbrances. These questions are not unique to the surviving spouse's life interest in the matrimonial home. They arise with respect to any life interest in real property. The usual rule for apportioning liability between life tenants and remaindermen is that the life tenant is responsible for day-to-day, ordinary or casual expenses, such as rates, taxes and interest on mortgages. The remainderman, in this case the intestate successors who hold it in trust for the surviving spouse, is responsible for expenditures of a capital nature. This would embrace expenses incurred which are of long-term benefit to the property.

It is possible that difficult questions may arise concerning the life tenant's interest. For example, the matrimonial home may not be suitable, and the surviving spouse may wish to sell it and purchase more appropriate accommodation. Would the life interest be transferable? May the surviving spouse elect to sell the matrimonial home and receive a sum of money representing the capitalized value of the life interest? Questions of this kind are governed by

the provisions of the *Land (Settled Estate) Act*.[126] The surviving spouse's life interest is a "settled estate" within the meaning of that Act. "Settled estate" is defined as ". . . all interests in land which are the subject of settlement."[127] "Settlement" is defined to include ". . . an Act . . . of the Legislature . . . under which an interest in land stands limited to or in trust for any persons by way of succession . . ."[128] Under that Act the court has power to authorize sales of settled estates[129] as well as to set aside a portion of sale proceeds to satisfy the interest of any party entitled to the income from the settled estate.[130] Additionally, under the *Land (Settled Estate) Act*, the surviving spouse may be entitled to grant a lease of the matrimonial home for up to 21 years,[131] although the surviving spouse's interest under the *Estate Administration Act* is for life, "or so long as the surviving spouse wishes to retain the estate." The meaning of this provision is uncertain. Possibly, granting a lease would be tantamount to relinquishing the estate and the surviving spouse's interest would terminate.

(c) The Life Interest in the Matrimonial Home Causes Problems in the Allocation of Estate Assets

Providing that the surviving spouse is entitled to a preference share, plus a share of the residue, plus a life interest in the matrimonial home, does not resolve the following question: against what portion of the estate does the spouse's entitlement lie? It follows from providing that the surviving spouse is entitled to a life estate in the matrimonial home that it is to the surviving spouse's advantage if his or her intestate share is satisfied from estate assets other than the matrimonial home. It is to the children's advantage if the matrimonial home is allocated to the surviving spouse's intestate share.

A legislative allocation which will be fair for every individual case cannot be resolved in advance. The conclusion of the authors of the Probate Practice Manual suggest that the following approach for dividing estate assets should be adopted:[132]

> In the absence of judicial interpretation the authors consider that the spouse's share of the "residue" should first be ascertained without reference to section 108, so that the spouse takes one-half or one-third of the matrimonial home absolutely, and that the "estate for life" is then superimposed upon the matrimonial home. If this is correct the spouse in effect takes an "estate for life" only in the other one-half or two-thirds.

In many cases, some sort of compromise will be appropriate. It is our understanding that each time this issue arises it is resolved through negotiation, by the surviving spouse, child, and administrator of the estate. If infants are entitled to share in the estate, the Public Trustee will be involved in resolving this issue.

(d) The Life Interest Causes Valuation Problems

An issue not canvassed in the previous discussion is whether valuing the matrimonial home, when it is subject to an equitable life interest in favour of the surviving spouse, causes any administration problems. Calculation of the matrimonial home's fair market value, without taking into account the surviving spouse's life estate, may not represent its actual value. An equitable life interest in favour of the surviving spouse probably subtracts from the matri-

[126] R.S.B.C. 1979, c. 215.
[127] Section 1.
[128] Section 1.
[129] Section 21.
[130] Section 21 (3).
[131] Section 48.
[132] B.C. 30/09/81; 2-8.

monial home's value, and that factor should be taken into account, both when valuing the estate to determine the respective entitlement of next-of-kin, and when determining allocation of estate assets. Our research has not disclosed whether valuation of a matrimonial home subject to an equitable life interest in favour of the surviving spouse causes any real problems, or, indeed, whether any attempt is made to calculate the matrimonial home's diminished value to next-of-kin in whom it vests and who must await the surviving spouse's death before they may use it. As we mentioned earlier, allocation of estate assets appears to be a question resolved by agreement among the interested parties. The absence of reported cases on this question suggests that no problems of this nature arise.

In a Manitoba case, *Re Zarowiecki*,[133] the deceased, by will, left to his wife a life estate in their "homestead." The homestead was sold before his death. The court calculated the value of the life estate at the time of sale, taking into account the widow's life expectancy, a real interest rate of three per cent, and the value of the property, to determine the funds which should be transferred to the widow.[134]

(e) Recommendation

These are the various problems presented by providing the surviving spouse with a life interest in the matrimonial home. Since the concern is to ensure adequate provision for the surviving spouse, a life interest in the matrimonial home is unnecessary provided he or she is otherwise entitled to a generous share of the estate. That concern is answered by our earlier recommendations that the surviving spouse be entitled to a preference share of $200,000 and one-half of the residue of the estate.

Lastly, it should be observed, the matrimonial home may be losing its importance for a number of reasons. For example, in an increasing number of estates there is no matrimonial home, or it is held in joint tenancy and not subject to intestate succession, or it is subject to a mortgage debt so that the deceased had very little equity in it. Consequently, the Commission has concluded that sections 108 and 109 of the *Estate Administration Act*, insofar as they relate to the matrimonial home, should be repealed. The surviving spouse should still receive the household furnishings as they are defined in section 108.

The Commission recommends that:

7. (1) Sections 108 and 109 of the Estate Administration Act *be repealed.*

(2) (a) The household furnishings should go to the surviving spouse;
(b) "household furnishings" in (2) (a) means chattels usually associated with the enjoyment by the spouses of the matrimonial home, including the family automobile.

(f) Election

In many cases the matrimonial home may represent more to the surviving spouse than just an estate asset of value. He or she may wish to continue to reside in the home. The turmoil of a spouse's death might be further increased by the disruption of having the matrimonial home sold and having to move elsewhere.

It would appear that the surviving spouse has only a limited right to elect whether to receive assets to satisfy his or her intestate share. That right is

[133] (1982) 11 E.T.R. 155 (Man. Surr. Ct.).
[134] Relying on *Re Casselman*, (1974) 6 O.R. (2d) 742, 54 D.L.R. (3d) 637 (C.A.).

subject to objections raised by other interested next-of-kin. A surviving spouse is, however, under the *Estate Administration Act*, entitled to the household furnishings of the matrimonial home.[135]

In *Re Harris*,[136] Middleton J. said:[137]

> There is no question that as soon as debts have been paid the administrator holds the estate in trust to convert and divide among those entitled under the statute to distribution, in precisely the same way that an executor holds an estate in trust under a will when he is directed to convert and distribute among several residuary devisees.

Middleton J. cites *Cooper* v. *Cooper*,[138] as authority that an heir may elect to take the estate *in specie*, and goes on "to consider the exact nature of this right of election."[139]

> The case is simple where there is only one *cestui que trust* or where the *cestuis que trust* are all of one mind and no complication arises from disability. There, as soon as all other interests have been provided for, the right to demand the delivery of the estate *in specie* is incontrovertible. But I think it is also well established that where the parties beneficially concerned are not of one mind then the parties who so desire are entitled to insist upon the normal course of administration being pursued to the end.

It would appear, therefore, that the spouse of an intestate may elect to take her share of the estate *in specie* or the administrator could elect to allocate *in specie*, subject in both cases to the right of other next-of-kin to insist that the estate be liquidated.

Our earlier conclusion was that intestate succession should first protect the interests of the surviving spouse above those of other next-of-kin, including children of the marriage. That conclusion suggests that the surviving spouse should be entitled to elect that his or her portion of the estate be appropriated against the matrimonial home.

Our information suggests that these kinds of problems do not often arise, and that their resolution seldom depends upon litigation. Moreover, the wisest allocation of estate assets may be dictated by concerns to minimize tax payable on transfers of capital property. Although the surviving spouse would probably elect in accordance with those concerns; he or she may not. A power to elect may be used to significantly affect the value of an estate, and prejudice the interests of other next-of-kin. In the Working Paper we invited comment on whether allocation problems do arise, and if so, whether permitting the surviving spouse a right to elect what assets will satisfy his or her intestate share would satisfactorily answer those problems. Our correspondents generally did not think that these problems called for a legislative response.

A limited right to elect to receive the matrimonial home as part of the surviving spouse's intestate share, however, has several advantages. It may significantly ease problems of allocating assets to satisfy the interests of next-of-kin. And it ensures that the surviving spouse is involved in resolving questions which are of paramount concern to his or her future. A majority of the Commission has concluded that this approach should be adopted. The minority favours giving the surviving spouse the entire estate. Under that approach, this issue would not arise.

Various procedural aspects of the right to elect must be addressed. The surviving spouse should be informed of this right of election. The right to elect should not persist indefinitely, since that might result in unduly delaying

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[135] Section 108 (2) (b).
[136] (1915) 22 D.L.R. 381 (Ont. S.C.).
[137] At page 383.
[138] (1874) L.R. 7 H.L. 53.
[139] At page 383.

administration of the estate. Under section 84 of the *Estate Administration Act*, except in certain defined circumstances, an estate may not be distributed until one year after the deceased's death. The right to elect, unless the court otherwise orders, should not extend beyond that period.

A majority of the Commission has concluded that the applicant for a grant of administration should, with that application, give the surviving spouse notice of the right to elect to appropriate his or her share of the estate first against the matrimonial home. The election should be exercised by giving notice to the administrator and the deceased's issue entitled to share in the intestacy. In that notice, the surviving spouse should place a value on the matrimonial home. The administrator may act on that valuation if the deceased's issue entitled to share on the intestacy consent to it in writing. Otherwise the administrator should apply to the court for an order as to the value of the matrimonial home. It is contemplated that usually this issue will be settled by agreement. Since, in many cases, the surviving spouse will also be administrator of the estate, some procedural safeguards are necessary with respect to valuing the family home.

The value of the deceased's interest in the matrimonial home may exceed the surviving spouse's intestate share. In that case, the surviving spouse should be able to purchase, with his or her own funds, the remaining interest, in accordance with the valuation of the deceased's interest in the matrimonial home. That too should constitute part of the spouse's election. If the surviving spouse does not make that election, the interest will vest in the deceased's issue. They could either hold their interest and permit the surviving spouse to reside in the matrimonial home, or apply for an order of partition and sale. Consequently, if the spouse wishes to retain the matrimonial home in these circumstances, he or she should usually elect to purchase the remaining interest. If the surviving spouse does not have sufficient funds to do this, then in most cases it would probably be best for all concerned to sell the matrimonial home and divide the proceeds. It may happen that the spouse has sufficient funds to reside in the matrimonial home, but not to buy out the remaining interests. If there are infant children, the Public Trustee will be involved in protecting their interests. If the children are residing with the surviving spouse, it will often be best to retain the matrimonial home, and defer its sale until they reach their majority or reside elsewhere. If that is the case, they can be registered on title as tenants-in-common, or a sale of their interest can be arranged under which payment is deferred. If deferred payment is arranged, the children's interest can be protected by a mortgage against the property or the pledge of some other security.

In England the surviving spouse is permitted to appropriate his or her share of an intestate estate against the matrimonial home. The second schedule to the *Intestates' Estates Act 1952* would provide a useful model for similar legislation in British Columbia. That schedule is to be found in Appendix M to this Report.

The Commission recommends that:

8. *Legislation be enacted to implement the following principles:*
   - *(a) The surviving spouse may elect to appropriate his or her share of the estate first against the matrimonial home.*
   - *(b) Notice to the surviving spouse of the right to elect should be given with the application for letters of administration.*
   - *(c) The election is exercised by giving notice in writing to the administrator and to the deceased's issue entitled to share in the intestacy.*

(d) The notice of election must place a value on the deceased's interest in the matrimonial home.

(e) Unless the value placed on the deceased's interest in the matrimonial home is agreed to by the deceased's issue entitled to share in the intestacy, and their written consents obtained, the administrator must apply to the court for an order as to the value of the deceased's interest in the matrimonial home.

(f) The right to elect may be exercised until one year has elapsed from the death of the deceased unless the court shall, before or after the expiration of the year, extend the time in which the election may be exercised.

(g) The value placed on the deceased's interest in the matrimonial home is to be determined as at the date immediately preceding the deceased's death.

(h) If the value of the deceased's interest in the matrimonial home exceeds the surviving spouse's share in the estate, the surviving spouse may elect to purchase the remaining interest from the estate, or from those in whom that interest beneficially vests, in accordance with its valuation under the election.

(i) The surviving spouse may make these elections even if he or she is the deceased's personal representative, notwithstanding the rule that a trustee may not purchase trust property.

(j) If the surviving spouse is the deceased's representative, there is no requirement that the surviving spouse serve notice of the right to elect or of the election on the surviving spouse.

11. Partial Intestacies

We mentioned earlier that in some jurisdictions, legislation provides that a surviving spouse who has received property under a will is not entitled to a preferential share where a partial intestacy has occurred. This approach causes problems where the will alone does not make adequate provision for the spouse. There are two possible solutions to the problem of ensuring that a surviving spouse receives a sufficient share of the estate for his or her needs, in the event of a partial intestacy, but does not receive too great a share to the prejudice of children of the marriage. In Ontario the surviving spouse is entitled to a preferential share of a sum which, when added to the portion received by will, equals the preferential share that would have been received if all of the estate passed on an intestacy. A second solution is to permit the spouse to elect whether to share under the will or as on an intestacy.

These solutions are intended to prevent a spouse from receiving the bulk of the estate to the exclusion of the interests of the surviving children. It is, however, not difficult to imagine cases in which these solutions could work injustices. For example, a testator may have a wife and two children. He disposes of half of his estate by will, giving his wife $75,000 and his children each the sum of $150,000. The remainder of his estate passes under the intestate provisions. If the wife is not permitted a preferential share, the children, who have already received more than the wife, will now share in a further portion of the estate with the wife. The basic premise of intestate legislation is that the surviving spouse should be preferred since this is what most people would intend. We can see no reason to create a rule designed to limit the spouse's share. In the example, if the surviving spouse can elect to take under an intestacy, the children's shares would be substantially reduced. A right to elect in these circumstances would too greatly prejudice other beneficiaries of the will.

In the Working Paper we tentatively concluded that we would not favour amending the current approach taken with respect to partial intestacies. If there is competition between spouse and children for a fair share, we felt that issue was better left to the discretion of the court on a case-by-case basis, and under recommendation 1 the court will have a broad discretion to vary intestate succession as may be appropriate in the circumstances. Upon further consideration we see no reason to depart from our earlier conclusion.

12. When the Interest of the Next-of-Kin Vests

As we mentioned, next-of-kin take an inchoate right pending administration. No interest in the estate vests in the next-of-kin until, at the very earliest, the assets of the estate are ascertained. The South Australian Law Reform Committee noted two cases where this position resulted in injustice:[140]

> In the first of the two cases a person who had an interest in a house or would have had an interest in a house if an administrator had been appointed and the estate administered was held to have none: see *Eastbourne Mutual Building Society* v. *Hastings Corporation* 1965 1 W.L.R. 861. In the second the widow of an intestate sought to defend an action for possession of the matrimonial home on the ground that the provisions of schedule two to the English Intestate Estates Act, 1952 applied (which required the matrimonial home to be appropriated to her interest in the estate of her deceased husband) and was refused leave because those provisions did not give her any equitable interest or any other interest so as to defend an action for possession: see *Lall* v. *Lall* 1965 1 W.L.R. 1249. The second of these is especially important, as we have already proposed that a similar right be given to a widow under our proposed amended Statute of Distribution and we certainly do not wish to see such a right defeated as it was in *Lall* v. *Lall*. In our opinion the law ought to be altered to provide that next of kin do take a vested interest upon the death of an intestate, which vested interest is liable to be divested upon the production of a valid will.

We are not persuaded that there is any need to change the current rule. Our research has disclosed very few actual problems that result from it. On the other hand, to vest rights subject to divestment upon the production of a valid will could cause many other administrative problems including attracting additional tax. We have concluded that no change should be made to the current rule.

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[140] Supra, n. 118 at 12.

A. Introduction

Many legislative attempts have been made to secure adequate provision for the surviving spouse and dependants of the deceased.[1] When there was no right to make a will, succession was determined by operation of law. Later, when a person could make a will, freedom of testation was permitted for only a portion of a testator's property, in order that his widow and children would be provided for.[2] Maine, in *Ancient Law*, a monograph of the late 19th century, after concluding that intestate succession predated testamentary obligations, shows how widespread in the development of wills was the bar against disinheriting family members:[3]

> The evidence, however, such as it is, seems to point to the conclusion that Testaments are at first only allowed to take effect on failure of the persons entitled to have the inheritance by right of blood genuine or fictitious. Thus, when Athenian citizens were empowered for the first time by the Laws of Solon to execute Testaments, they were forbidden to disinherit their direct male descendants. So, too, the Will of Bengal is only permitted to govern the succession so far as it is consistent with certain overriding claims of the family. Again, the original institutions of the Jews having provided nowhere for the privileges of Testatorship, the latter Rabbinical jurisprudence, which pretends to supply the *casus omissi* of the Mosaic law, allows the power of Testation to attach when all the kindred entitled under the Mosaic system to succeed have failed or are undiscoverable. The limitations by which the ancient German codes hedge in the testamentary jurisprudence which has been incorporated with them are also significant, and point in the same direction. It is the peculiarity of most of these German laws, in the only shape in which we know them, that, besides the *allod* or domain of each household, they recognise several subordinate kinds or orders of property, each of which probably represents a separate transfusion of Roman principles into the primitive body of Teutonic usage. The primitive German or allodial property is strictly reserved to the kindred. Not only is it incapable of being disposed of by testament, but it is scarcely capable of being alienated by conveyance *inter vivos*. The ancient German law, like the Hindoo jurisprudence, makes the male children co-proprietors with their father, and the endowment of the family cannot be parted with except by the consent of all its members.

As fetters on testation were removed,[4] it rapidly became apparent that there was a need to protect dependants of a testator who had irresponsibly failed to make adequate provision for them in his will.[5]

Three options were open to reformers who desired to restrict testamentary freedom in favour of a testator's family. One solution is to provide that a specified portion of the estate passes automatically to certain near relatives. The testator may dispose of the balance of his estate as he desires. A second option is that favoured by Roman law, under which a person disinherited by a will could not assert any absolute right to share in the testator's estate. Instead, the claimant had to show that he had been unjustly deprived of the share of the testator's estate he would have received if the testator died intestate. If his contention were upheld, the will was set aside and the estate passed as on an intestacy.

Common law jurisdictions have, for the most part,[6] rejected both options in favour of giving a court discretion to intervene in the testator's distribution

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[1] *See* E.L.G. Tyler, *Family Provision* (Butterworth's, London, 1971), Chapter I.

[2] *E.g.*, the widow's right to dower and the widower's right to curtesy. These were abolished in England (*The Administration of Estates Act, 1925*) and British Columbia (S.B.C. 1925, c. 2, s. 4) in 1925.

[3] (5th ed., 1881) at 197-8.

[4] For example, with the abolition of dower and curtesy, *supra* n. 2.

[5] Barbara Ann Kulzer, *Property and the Family: Spousal Protection*, (1973) 4 Rutgers-Canadian Law Journal, 195.

[6] The American *Uniform Probate Code* provides that a surviving spouse may elect between taking one-third of the estate, or the benefits contained in the will (s. 2-201).

of his estate if he did not adequately discharge his obligations to his family. This solution was adopted first by New Zealand in 1908,[7] and subsequently by most Commonwealth jurisdictions. The Alberta Institute of Law Research and Reform, commenting upon the New Zealand legislation, said:[8]

> The success of this bold legislative experiment by New Zealand is due to the satisfactory reconciliation of two basic social interests of the law of succession. One is testamentary freedom and the other is that dependants of the deceased should receive proper maintenance. Proper maintenance for dependants has two aspects. One recognizes the responsibility of the deceased to his dependants which is of an individual nature. The deceased should not be permitted to leave, without proper support, persons who stood in a certain familial relationship to him at his death. The other is a social responsibility of the deceased to the state. The deceased should provide proper maintenance to his dependants in order that they will not have to be supported from public funds.

Similar legislation was enacted as part of British Columbia law in 1920 under the title *"An Act to Secure Adequate Provision for the Maintenance of the Wife and Children of a Testator."*[9] The 1920 Act has been carried forward virtually unaltered and is now entitled the *Wills Variation Act*.[10]

B. The Wills Variation Act

Dependant's relief legislation is a compromise between reserving a fixed share of the deceased's estate for his dependants, and complete freedom of testation. Courts are granted a discretion to review the deceased's will to determine whether he made appropriate provision for dependants. In British Columbia only the deceased's lawful spouse and children, including illegitimate children of the mother, are entitled to invoke that jurisdiction of the court.

It has often been said that the court's discretion to award a part of the testator's estate to a dependant does not permit the courts to make a new will for the testator.[11] Nevertheless, the power to make adequate provision for applicants must entail variation of the testator's will. The present title of the Act acknowledges this fact. Formerly known as the *Testator's Family Maintenance Act*, the name of the Act was changed in the 1979 statutory revision to the *Wills Variation Act*. The statement that the courts may not remake a testator's will is no more than an emphatic way of saying that the courts should refrain from making an order that requires a disposition of assets in a manner contrary to the intention of the testator unless demonstrably necessary. In general, courts should strive to give effect to the scheme of succession intended by the testator and set out in his will.[12] The object of the Act is to secure adequate provision for the deceased's family, and not to require wills to conform to an objective standard of reasonableness.

It has also been said that decisions from other jurisdictions concerning family protection statutes are of limited assistance in construing the British Columbia Act.[13] Many of these statutes differ materially in the nature of the power to be exercised and the terms on which an order may be made.

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[7] *Family Protection Act*, 1908, c. 60 (N.Z.).

[8] Institute of Law Research and Reform, Report No. 29, *Family Relief*, (1978), 7.

[9] S.B.C. 1920, c. 94.

[10] S.B.C. 1983, c. 4.

[11] *Allardice v. Allardice*, [1911] A.C. 730 (P.C.); *Re Morton Estate*, [1934] 3 W.W.R. 719, 49 B.C.R. 172 (B.C.S.C.); *Re McPhee*, [1947] 1 W.W.R. 741 (B.C.S.C.); *Re Smith*, [1955] 2 D.L.R. 503 (B.C.S.C.); *Barker v. Westminster Trust Co.*, [1941] 3 W.W.R. 473, 57 B.C.R. 21, [1941] 4 D.L.R. 514, *reversing* [1940] 3 W.W.R. 239 (B.C.C.A.); *Re Jones*, (1962) 5 C.R. 273, 280; *Dennison v. Swain*, (1966) 54 W.W.R. 603 (B.C.C.A.); *Bruner v. Hilton*, (1979) 15 B.C.L.R. 116 (B.C.C.A.).

[12] *Re Tiernan*, (Unreported) S.C.B.C. Vanc. Reg. No. X847/75; *Re Schmidt*, (1952) O.R. 532 (C.A.).

[13] *Re Anderson*, [1934] 1 W.W.R. 430, [1934] 2 D.L.R. 484 (Alta. C.A.).

Nevertheless, the fundamental nature of the power exercised — to provide adequately for the testator's dependants — is uniform from jurisdiction to jurisdiction. Regardless of differences in drafting, the courts' application of the Act from jurisdiction to jurisdiction is similar. British Columbia courts have not been reluctant to look to the example of other jurisdictions to determine the meaning and effect of dependant's relief legislation, particularly in the early days of the legislation when little or no local jurisprudence had been developed.

C. Who May Apply

The Act provides that the testator's wife, husband or children may apply for adequate, just and equitable provision in the circumstances if the testator fails to make adequate provision for them.[14] The right to apply is personal. It may not be assigned. Nor may an executor of a deceased person, who would have been entitled to apply if he or she were alive, apply for relief on behalf of that person's estate.[15] Arguably, however, death does not remove the right to apply, only the need for maintenance. In *Barker* v. *Westminster Trust Company*,[16] and in *Re McCaffery*[17] the executors were permitted to continue proceedings on behalf of an applicant who died after the hearing but before the judgment. Furthermore, entitlement is purely discretionary. A person entitled to apply has no absolute right to share in the estate, regardless of need or the size of the estate.[18]

In the following discussion, we will consider the various classes of applicants permitted under the Act.

1. Surviving Spouse

Section 2 of the *Wills Variation Act* speaks of "wife" or "husband." A common law spouse would not be entitled to apply for a share in the deceased's estate.[19] Neither may a former spouse, that is a person whose marriage to the deceased has been terminated by decree absolute of divorce or by declaration of nullity, apply under the Act. However, pursuant to other legislation, a former spouse may apply to the court for maintenance payments from the estate provided his or her rights to apply were preserved when the marriage was dissolved.[20] For example, a right to apply may have been reserved under a maintenance order which is stipulated to be for the dependant spouse's life.

Even if the divorce was obtained in another jurisdiction and its validity is not recognized in Canada, the surviving spouse will be estopped from denying the validity of the divorce if pecuniary advantage has been obtained.[21] If, however, only a decree *nisi* has been obtained, a surviving "former" spouse may still apply.[22] As well, a separated spouse may apply under the Act. The mere fact of separation does not disentitle a spouse from applying for relief.[23]

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[14] Section 2.

[15] *Re Kerby*, [1949] O.W.N. 187 (O.H.C.).

[16] *Supra*, n. 11.

[17] [1931] O.R. 512, [1931] 4 D.L.R. 930 (C.A.).

[18] *Re Hornett*, (1962) 33 D.L.R. (2d) 289, 38 W.W.R. 385 (B.C.S.C.).

[19] *Re Hoffman*, [1931] 1 W.W.R. 293 (B.C.S.C.); *see also Re O'Connell Estate*, (1979) 109 D.L.R. (3d) 584 (N.S.S.C.) on the meaning of "widow."

[20] *Ducharme* v. *Ducharme*, [1981] 7 A.C.W.S. (2d) 386 (Man. Q.B.).

[21] *Downton* v. *Royal Trust Co.*, [1973] S.C.R. 437, 3 N. & P.E.I.R. 576, 34 D.L.R. (3d) 403, *Re Jones*, (1974) 6 O.R. (2d) 11, 19 R.F.L. 289, 51 D.L.R. (3d) 655 (O.H.C.).

[22] *Re Laur*, (1975) 7 O.R. (2d) 385, 21 R.F.L. 159, 55 D.L.R. (3d) 321 (Surr. Ct.); *Adams* v. *Irvine and Adams*, (1978) 4 R.F.L. (2d) 295 (Sask. Q.B.); *cf. Re Shirley*, (1965) 55 W.W.R. 56 (Sask. Q.B.).

[23] *Re Pemberton*, [1948] 2 W.W.R. 745 (Sask.); *Chernoff* v. *Chernoff*, (1962) 33 D.L.R. (2d) 742, affirming 32 W.W.R. 473 (Sask. C.A.); *Dale* v. *Crosby*, (unreported B.C.S.C. decision) [1981] B.C.D. Civ. 4223-08, *per* Macdonell L.J.S.C.

In Australia and in New Zealand several cases have held that a surviving spouse who remarries is not entitled to bring an application under dependant's relief legislation.[24] Similarly, Australian and New Zealand courts have been reluctant to make an award in favour of a surviving spouse which would extend beyond widowhood.[25]

In 1960, the New Zealand Court of Appeal overruled previous decisions which held that a widow who remarried was not entitled to relief. In *Bailey* v. *Public Trustee*,[26] it was held that the New Zealand Act, which permitted the "widow" to apply, determined the eligibility of the surviving spouse to apply by reference to that spouse's status at the date of the testator's death. If a widow subsequently remarried, her status changed but not her right to apply.

The issue of the effect of remarriage on an applicant's eligibility was one of statutory interpretation. In the earlier cases which held that remarriage was a bar to an applicant's rights, the courts strictly construed the statutory language.

In British Columbia it does not appear that the issue has been litigated. The British Columbia Act refers to "husband" or "wife." Immediately upon the death of a spouse the surviving spouse is no longer a "husband" or "wife," but is a widow or widower. Notwithstanding that the wording of the statute, strictly, is not apt, the legislative intent is clear. In British Columbia subsequent changes in an applicant's legal status should not disqualify the applicant from applying under the *Wills Variation Act*.

2. CHILDREN

Only legitimate children or legally adopted children may apply under the Act for a share in their father's estate.[27] Section 2 (2) of the Act provides that an illegitimate child is treated as a legitimate child of his or her mother. An illegitimate child, therefore, may apply in respect of his or her mother's estate.[28]

Since the British Columbia Act does not expressly permit applications by the testator's grandchildren,[29] "informally" adopted children,[30] or children to whom the testator stood in *loco parentis*, the court may not make an order in their favour. The jurisdiction is purely statutory.[31]

In other jurisdictions the age, health or marital status of an applicant may be used to limit eligibility.[32] For example, in Alberta, adult children of a testator are not permitted to apply. Similar limitations are not found in the British Columbia Act. In British Columbia, adult children may apply, although there is no guarantee their application will be successful.[33]

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[24] *See* Davern Wright, *Testator's Family Maintenance in Australia and New Zealand*, (1974) at 8-12.

[25] *See, e.g., Re Crewe*, [1956] N.Z.L.R. 315 (C.A.); *Worlidge* v. *Doddridge*, (1957) 97 C.L.R. 1 (H.C. Aust.).

[26] [1960] N.Z.L.R. 741 (C.A.).

[27] *Re Kolbu, Blair* v. *Fishleigh*, [1951] 1 D.L.R. 462 (Sask. C.A.); *Re Lakha Singh*, (1955) 14 W.W.R. 617 (B.C.S.C.); *Re Brosseau*, [1975] W.W.D. 34, 19 R.F.L. 255 (B.C.S.C.); *cf Re Lamont*, (1978) 93 D.L.R. (3d) 84 (Sask. C.A.); *Montreal Trust Co.* v. *Lekstrum*, [1980] 5 W.W.R. 159 (Sask. Surr. Ct.). The validity of an adoption of a non-resident child is determined by the law of the jurisdiction where the child was adopted. *Re McAdam*, (1925) 35 B.C.R. 547, [1925] 4 D.L.R. 138 (B.C.S.C.); [1925] 2 W.W.R. 593; *Re Kurnemis*, (1978) 3 R.F.L. (2d) 213 (Ont. Surr. Ct.).

[28] *Ibid.*

[29] *Re Compton-Lundie, George* v. *Else*, (1958) 26 W.W.R. 229 (B.C.C.A.); *Re DeRoche*, (1964) 51 W.W.R. 120 (Sask. Q.B.).

[30] *Re Esplin*, [1946] 2 D.L.R. 404, [1946] 1 W.W.R. 679 (B.C.S.C.).

[31] *Re Buchanan*, (1975) 16 N.S.R. (2d) 262, 24 R.F.L. 255 (N.S.S.C.).

[32] *See, e.g., Re Bourne*, [1950] O.W.N. 807 (Surr. Ct.); *Re Taylor*, (1960) 33 W.W.R. 699, 26 D.L.R. (2d) 684 (Sask. C.A.); *Re DeRoche*, (1964) 51 W.W.R. 120 (Sask.); *Re Purkanski*, (1966) 56 D.L.R. (2d) 475 (Sask. Q.B.).

[33] *E.g., Rutledge* v. *Jackson*, (1981) 26 B.C.L.R. 239 (B.C.S.C.); *see also* Hilary Clark, "Financial Provision for Adult Children," (1980) 130 N.L.J. 404; *Stepanic* v. *Kellman*, [1981] B.C.D. Civ. 4223-02; *Hope* v. *Colhan*, (Unreported B.C.S.C. decision) [1980] B.C.D. Civ. 4223-07; *see also Re Fraser Estate*, (1964) 50 W.W.R. 268 (B.C.C.A.); *Re Stubbe*, (1973) 1 W.W.R. 354 (B.C.S.C.); *Garrett* v. *Zwacker*, (1976) 15 N.S.R. (2d) 118, 25 R.F.L. 332 (C.A.); *Corkum* v. *Corkum*, (1976) 18 N.S.R. (2d) 501, 74 D.L.R. (3d) 700 (C.A.); *Re Page*, (1969) 67 W.W.R. 407 (B.C.S.C.); *Hammond* v. *Gagnon*, (unreported) [1981] B.C.D. Civ. 4223-11, *per* McLachlin J.; *Thompson* v. *Thompson*, (unreported B.C.S.C. decision) [1981] B.C.D. Civ. 4223-07, *per* Meredith J.; *Hinton* v. *Hutchison*, [1982] B.C.D. Civ. 4223-10, *per* Toy, J.

Although the class of applicants under the Act is very limited, the court when exercising its discretion may be influenced by the responsibility the testator had for persons provided for in his will who have no standing under the Act. The testator may have owed a greater obligation than that alleged by the applicant, to support other persons not eligible to apply under the Act. The courts should consider the moral claims that persons benefitting under the will had against the testator.[34]

D. Criteria Applied by the Court

1. Relevance of Conduct

A testator's conduct is not in issue on an application for relief.[35] For example, the fact that a disposition is in favour of a mistress and illegitimate child is not of itself sufficient reason to vary the testator's will. In *Re Joslin*,[36] *Re Shadforth*[37] and *Rill* v. *Miller*[38] courts refused to vary wills that preferred common law spouses over widows. The only issue is whether the testator has made adequate provision for those to whom he owed moral obligations.

The court is, however, expressly empowered to refuse to make an order in favour "of any person whose character or conduct is such as in the opinion of the court to disentitle him or her" to the benefit of the order sought.[39] Additionally, the court may accept evidence of the testator's reasons for making the dispositions found in his will. The weight to be given to that evidence is a matter for the court.[45] A provision in a will, however, revoking gifts to any beneficiary who challenges the will, is contrary to public policy and void since it would be designed to avoid the *Wills Variation Act*.[41]

It would appear that conduct which will disentitle a needy applicant must be extreme. In *Re Borthwick*[42] it was observed:

> I cannot think that the conduct of the dependant towards the testator or otherwise can make the difference between whether you leave her starving in the gutter or no. The courts have not taken that view. It must therefore mean that an extravagant or an erring wife may be given less than one against whom nothing can be said.

Improper conduct on the part of an applicant appears to be a satisfactory ground to hold that a lesser sum constitutes adequate provision, but seldom will it disentitle a needy applicant. In British Columbia, the leading case on this point is *Re Bailey Estate*.[43] In that case the testatrix's adult son, described as a weakwilled and irresponsible spendthrift, was disinherited. The court, in view of the magnitude of the estate, made a small award in his favour "to keep him from destitution, but not such an income as to encourage him to abandon all efforts to maintain himself."[44]

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[34] *Re La Fleur Estate*, [1948] 1 W.W.R. 801 (Man. K.B.); *Re Quon*, (1969) 4 D.L.R. (3d) 702 (Alta. S.C.); *Re Pedlar*, (1933) 46 B.C.R. 481, [1933] 1 W.W.R. 267 (B.C.S.C.); *Re Fergie*, (1939) 54 B.C.R. 431, (1939) 4 D.L.R. 821, (1939) 3 W.W.R. 573 (B.C.S.C.); *Re Morton*, (1934) 49 B.C.R. 172, [1934] 3 W.W.R. 719 (B.C.S.C.); *Re Stark*, (1967) 62 W.W.R. 170 (B.C.S.C.); *Clayson* v. *Blake*, (1982) 16 A.C.W.S. (2d) 462 (B.C.S.C.).

[35] *Re Elworthy*, (1928) 39 B.C.R. 474, [1928] 2 D.L.R. 421, [1928] 1 W.W.R. 737 (B.C.S.C.).

[36] [1941] 1 All E.R. 302 (Ch.D.).

[37] (1943) 58 B.C.R. 317, [1943] 2 D.L.R. 123, [1943] 1 W.W.R. 793 (B.C.S.C.); *see also Re Rix*, (1975) 23 R.F.L. 34 (B.C.); *Menard* v. *Blowers*, (1982) 28 R.F.L. (2d) 289 (Man. Q.B.).

[38] (1969) 9 D.L.R. (3d) 211 (Sask. C.A.).

[39] Section 2 (3).

[40] Section 2 (3), s. 2 (4); *see, e.g., Granfield* v. *Williams*, (1981) 23 R.F.L. (2d) 127 (B.C.C.A.); *Valouch* v. *Valouch*, (unreported B.C.S.C. decision) Vernon Reg. No. 80/0503, Mar. 9, 1982, *per* Dohm J., [1982] B.C.D. Civ. 4223-08.

[41] *Re Kent*, (1982) 13 E.T.R. 53, [1982] 6 W.W.R. 165 (B.C.S.C.).

[42] [1949] Ch. 395, 401-2, *per* Harman J.

[43] [1972] 1 W.W.R. 99, *aff'd.* [1972] 3 W.W.R. 640 (B.C.C.A.).

[44] *Ibid.* 108; *see also Re Dunn*, (1944) 60 B.C.R. 457, [1944] 3 W.W.R. 289 (B.C.S.C.).

In some jurisdictions, if the surviving spouse has been guilty of misconduct which would bar an application for alimony, he or she is not entitled to an order under dependant's relief legislation.[45] In *Re Nixey*,[46] a Manitoba decision, the widow deserted the testator several years before his death. Her application was unsuccessful.

British Columbia courts have made awards to spouses guilty of adultery or desertion.[47] Adultery and desertion are merely two of many factors which will be considered by the court to determine the extent of the testator's moral duty to the applicant. For example, desertion of a spouse in need after a marriage of short duration, separation without support for many years, and recent or continuing adultery have all been held to relieve the testator of any moral obligation to provide for the surviving spouse, and to be sufficient reason to deny applicants the benefit of an order.[48] Desertion alone, however, does not necessarily disentitle a surviving spouse to an award. Similarly, whether the spouses were separated does not conclusively bar a surviving spouse's claim for relief. For example, separation by mutual consent,[49] or separation agreement,[50] or due to the fault of the testator,[51] will not disentitle a spouse. If the applicant is responsible for continuing the separation,[52] or resists the testator's attempts to reconcile,[53] then the court may refuse to make an award in the applicant's favour.

Relief obtained under other legislation, such as the *Married Women's Property Act*,[54] does not prevent a spouse from receiving an order under the Act, nor does a surviving separated spouse's failure to apply for maintenance during the deceased's lifetime.[55] If the applicant was not responsible for the separation from the deceased, its duration is not necessarily significant to the outcome of the application. In *Manson* v. *Shoaf*[56] the separation had been for 12 years. In *Spinney* v. *Royal Trust Company*,[57] the separation had been for 10 years. In both cases the spouse was granted relief under dependant's relief legislation.

The Act was not intended to be a vehicle for punishing bad conduct nor for rewarding good conduct. The applicant's need, balanced with other claims against the testator's bounty and the size of the estate, is the primary guide.[58]

Significant as well is the status of the applicant. In *Re La Fleur*,[59] it was observed that:

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[45] *Drewry* v. *Drewry*, [1917] 1 W W R 266 (P C from Alta.).

[46] (1972) 31 D L R (3d) 597 (Man. Q B.).

[47] *Re Callegari*, (1958) 13 D L R (2d) 585 (B C S C.); *Re Urquhart*, (1956) 5 D L R (2d) 235 (B C S C.).

[48] *Re McGoun*, [1910] V L R 153, 16 A L R 141; *In the Will of T M*., [1929] Q W N 2, 20 Austr. Digest 44; *Re Edgelow*, (1956) 1 D L R (2d) 126 (B C S C.); *Re Murray*, (1966) 60 D L R (2d) 76 (B C S C.); *In the Will of Roberts*, [1919] V L R 125, 25 A L R 64; *Re Kennedy*, [1920] V L R 513, 26 A L R 231; *Walden* v. *Chapman*, (Unreported) B C S C decision, Vanc. Reg. No X7095-75, May 11, 1975, *per* Hinkson J.; *Re Wiles*, (1957) 10 D L R (2d) 761 (B C C A.).

[49] *Re Clissold*, [1970] 2 N S W R 619; *Adams* v. *Broughton and Yorke*, (1982) 20 Alta. L R (2d) 390 (Alta. Q B.).

[50] *In the Will of Birch*, (1920) 42 A L T 39.

[51] *Re Found*, (1924) S A S R 236; *Re Pemberton*, [1948] 2 W W R 745 (Sask.); *Chernoff* v. *Chernoff*, (1962) 33 D L R (2d) 742 (Sask. C A.); *Nickel* v. *Neumann*, (1983) 20 A C W S (2d) 512; *Porter* v. *Porter*, [1983] B C D. Civ. 4223-02 (B C S C.).

[52] *Ibid*. *See also Keane* v. *Keane*, (1972) 7 N B R (2d) 187 (N B S L.).

[53] *Re MacRobert*, (1967) 63 D L R (2d) 650 (N S S C.); *Re Murray*, (1966) 60 D L R (2d) 76 (B C S C.); *Re Gouge*, [1938] 1 W W R 832, 52 B C R 544 (B C S C.); *Re Foxe*, (1944) 60 B C R 77, [1944] 2 D L R 392 (B C S C.); *Re Cassidy*, (1965) 54 D L R (2d) 329 (Sask. Q B.).

[54] R S S 1965, c 340; *Manson* v. *Shoaf*, [1980] 5 W W R 106 (Sask. Surr. Ct.). *See now Married Persons' Property Act*, R S S 1978, c M-6.

[55] *Plumb* v. *Royal Trust Co*., [1943] 3 W W R 513 (Alta. Q B.).

[56] *Supra*, n. 54.

[57] (1973) 9 N S R (2d) 699, 19 R F L 191 (N S S C.).

[58] *Re Bailey Estate*, [1972] 1 W W R 99 (S C.), *aff'd*. [1972] 3 W W R 640 (B C C A.); *Re Coventry*, (1978) The Times, 14 Nov. (Eng.); *Bates* v. *Bates*, (1982) 11 E T R 310 (B C C A.); *see also de Beaudrap* v. *de Beaudrap*, (1983) 19 A C W S 287 (Alta. Q B.).

[59] [1948] 1 W W R 801, 56 Man. R 44, [1948] 2 D L R 682; *see also Re Blackwell*, [1948] O R 522, [1948] 3 D L R 621 (C A.); *Petrowski* v. *Berg*, [1979] B C D. Civ. 4223-02 (B C S C.); *Re Phillips*, (Unreported) B C S C decision, N W. Reg. No. 1431/73, June 10, 1974 *per* MacFarlane J.

> . . . the courts have dealt with various classes of dependants in different ways.
>
> A widow occupies the most favoured position, while relief is not given so readily to a widower. Infant children usually receive some measure of relief, directly or indirectly, by increased allowances to a parent. Adult daughters, married or single, receive relief more often than it is refused to them. . . .
>
> But the position of adult sons, who are not physically or mentally disabled, is different.

At one time it may have been true that a widow occupied a more favourable position than a widower. However, in *Re Stigings*,[60] an early British Columbia decision, it was held that it made no difference whether the application was by a widow or a widower, and under the current law it is likely that a widow and a widower are on an equal footing. For example, in *Re Clayton*,[61] an English decision, it was said:[62]

> I certainly do not see in the [English *Inheritance (Family Provision) Act, 1938*] a greater onus of proof on the surviving husband than on the surviving wife. It is simply a question in each case, be the claimant husband or wife, whether in all the circumstances as established in evidence, the deceased's failure to make any, or enough, provision for the surviving spouse is unreasonable; and I, for my part, find no material assistance nowadays from contemplating the sex of a claimant, or considering it a circumstance on its own when all the material circumstances have to be considered.

Many other factors, which are relevant to determine whether the court should vary a testator's will, may make conduct insignificant. The applicant's contribution to the estate may determine entitlement to an award.[63] The duration of the marriage may entitle reprobates to provision. In *Greenwood* v. *Greenwood*[64] a husband who deserted his wife applied for a share of her estate. They had been married for 30 years. The husband was a gambler, but regularly contributed his pay cheque to the family finances. That the parties had accumulated an estate was due solely to the frugality of the deserted wife. Prior to the wife's death the husband withdrew the entire balance from their joint bank account (about $5,000). The wife then severed their joint tenancy in the matrimonial home and, by will, left her one-half interest to the children of the marriage. The husband's application was successful and the court ordered that he have a life estate in the house. The duration of the marriage was a significant factor in determining what provision the wife should have made for her spouse.

A child of the deceased has less claim to his estate than does the surviving spouse.[65] Nevertheless, that a child neglects the testator, disobeys his wishes, or exhibits poor character generally, does not necessarily disentitle him to a portion of the estate.[66] In *Re Stewart*[67] the applicant daughter had "utterly neglected" her mother. It was held that the moral duty of the testatrix was "minimal in degree." Nevertheless, the daughter was awarded $2,000 out of an estate worth $19,000. In *Re Braaten*[68] the applicant daughter had been a rebellious teenager who had an illegitimate child. The daughter was in need,

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[60] (1924) 34 B.C.R. 347 (B.C.S.C.).

[61] [1966] 2 All E.R. 370 (Ch.D.).

[62] At 372.

[63] *Dowsett* v. *Dowsett*, [1948] O.W.N. 685 (Ont. H.C.).

[64] (1979) 11 B.C.L.R. 218 (B.C.S.C.); *see also Jensen* v. *Jensen*, (1981) 34 B.C.L.R. 163 (B.C.S.C.).

[65] *Schepenski* v. *Schepenski*, (1982) 15 A.C.W.S. 142 (B.C.C.A.).

[66] *Re Torvroos*, (S.C.B.C. X6695/74, Sept. 3, 1976, Spencer L.J.S.C.); *Re Fushimi*, (S.C.B.C. X4243 Vanc., McKay J. April 2, 1974); *Leard* v. *Maki*, (1982) 36 B.C.L.R. 92 (B.C.S.C.); *Valouch* v. *Valouch*, (S.C.B.C. 800503, Vernon Reg., March 9, 1982, Dohm J.); [1982] B.C.D. Civ. 4223-08; *Watson* v. *Lloyd*, (unreported B.C.S.C. decision, Van. Reg. No. A810765, Feb. 2, 1982, *per* Wong L.J.S.C.); [1982] B.C.D. Civ. 4223-07.

[67] (1961) 31 D.L.R. (2d) 601 (B.C.S.C.).

[68] (Unreported) B.C.S.C. decision, Vanc. Reg. No. X3685/72, Nov. 28, '73, *per* Munroe J.; *see also Re MacPhee*, (Unreported B.C.S.C. decision, Vanc. Reg. No. A761702, Nov. 4, 1977, Fawcus J.) *and see Re Fornataro*, (unreported) B.C.S.C. decision, Vanc. Reg. No. X5444, June 14, 1976, Ladner L.J.S.C.

and it was held that neither her character nor conduct disentitled her from the benefit of an order under the Act.

The child's conduct, however, may suggest that he or she has decided to look elsewhere for support. This was the case in *Re Andrews*[69] where the applicant daughter had left home to live with a married man contrary to the testator's wishes. In *Re Hallahan*[70] the applicant daughter, against the wishes of her parents, left home while still a minor and supported herself as a bar maid. She was not entitled to a portion of the estate. Additionally, the testator's generosity to a rebellious, ungrateful or troublesome child during his life may discharge any moral obligation owed by the testator. In *Re Dressel*[71] the testator disinherited his daughter. He had paid for her divorce, and supported her and her children for eight years before she remarried the same man. Her application was unsuccessful.

Usually the courts are reluctant to deny relief merely because the applicant possesses a flawed character. In such cases the courts will often make a small award. In two New Zealand cases, *Fletcher* v. *Ussher*[72] and *Re Bell*,[73] alcoholic sons, incapable of supporting themselves, were granted small allowances contingent upon abstaining from intoxicating liquor.

Conduct goes to the test of moral obligation, which we will discuss in the next section. The significance of conduct is a matter of discretion, merely one factor among many which must be balanced by a court in order to make an award which accurately represents contemporary community standards as to what is fair, just and equitable.

2. "Moral Obligation"

Section 2 (1) of the *Wills Variation Act* provides:

> **Maintenance from estate**
>
> **2.** (1) Notwithstanding any law or statute to the contrary, if a testator dies leaving a will which does not, in the court's opinion, make adequate provision for the proper maintenance and support of the testator's wife, husband or children, the court may, in its discretion, in an action by or on behalf of the wife, husband or children, order that the provision that it thinks adequate, just and equitable in the circumstances be made out of the estate of the testator for the wife, husband or children.

On a strict reading of this section, the court may interfere with the dispositions made by a testator only if it is convinced that the testator did not make "adequate provision for the proper maintenance and support" of his spouse and children. It would appear that the court would have no jurisdiction to proceed where the applicant is not in need of "maintenance and support." In *Pulham* v. *Yorkshire Trust Co.*[75] all parties consented to the variation of the testator's will sought by the surviving spouse. Mr. Justice Taylor found that the deceased had not breached his duty to make adequate provision and, therefore, the court had no jurisdiction to make an order whether all parties consented or not.[76]

Whether the applicant must show need to succeed in an application under the *Wills Variation Act* has been in doubt since the inception of the Act. In

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[69] [1955] 3 All E.R. 248 (Ch.D.).

[70] [1918] S.R. (N.S.W.) 138, 20 Austr. Digest 45; *cf. Ladhar* v. *Remanda*, (unreported) B.C.S.C. decision, [1980] B.C.D. Civ. 4223-05.

[71] (Unreported) B.C.S.C. 1230/73, New W., Munroe J.

[72] [1921] N.Z.L.R. 649.

[73] [1929] N.Z.G.L.R. 320.

[74] *Pulham* v. *Yorkshire Trust Co.*, (1980) 16 B.C.L.R. 80 (B.C.S.C.).

[75] *Ibid.*

[76] *See also Stepanic* v. *Kellaway*, (1981) 7 A.C.W.S. (2d), 69; (1981) Adv. 271.

early decisions concerning the exercise of the courts' discretion, establishing need was a prerequisite to relief.[77] The Supreme Court of Canada decided in *Walker* v. *McDermott*[78] that relief is not limited to need, but that the courts will act where the testator has breached a moral obligation to provide for the applicant. Breach of this moral obligation (i.e. the duty owed to a child or a spouse by a just, but not loving parent or spouse) will entitle an applicant to relief under the Act. It is uncertain, however, whether moral obligation is breached by failing to provide in the will for a dependant who is in need, or by not giving the dependant a fair share of the estate.[79]

In 1976, the British Columbia Court of Appeal again considered whether an applicant's need was the appropriate criterion to vary a testator's will. In *Lukie* v. *Helgason*,[80] Mr. Justice Robertson held that the showing of need was an absolute prerequisite to the exercise of the court's discretion. The court must first find that "adequate provision" had not been made. Mr. Justice Taggart, however, was not prepared to go that far. He said:[81]

> A review of the foregoing authorities and others to which we were referred leads me to the conclusion that in order to succeed it is not necessary for the respondents to show that they are in necessitous circumstances. Rather, they must bring themselves within the principles enunciated by Duff, J., in *Walker* v. *McDermott*.

Mr. Justice Carrothers held that the applicants had failed to show need. However, he did not deny relief on that ground alone. He found that they had not established entitlement on any of the required bases.[82]

Following this case, the British Columbia Supreme Court held on several occasions that the British Columbia Court of Appeal had established that need was a prerequisite, including *Re Schiebler*,[83] *Re Evers*,[84] *Stepanic* v. *Kelloway*[85] and *Hope* v. *Colban*.[86] In *Re Oxbury*[87] it was suggested that the test was one of "comparative" need between the applicant and those benefitted by the testator's will.

However, in *Re Sleno*,[88] Macfarlane J. held that *Lukie* did not go so far as to make need a prerequisite, but treated it as only one basis upon which relief could be founded. Similarly, in the cases of *Re Osland*,[89] *Re Radcliffe*,[90] *Re Magdell*,[91] *Re Holt*,[92] *Re Janke*,[93] and *Re Berger*,[94] it was held that need is not

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[77] *Re Elworthy*, [1928] 1 W.W.R. 737, 39 B.C.R. 474, [1928] 2 D.L.R. 421 (B.C.S.C.); *Re McCaffrey*, [1931] O.R. 512, [1931] 4 D.L.R. 930 (C.A.); *Re Hull*, [1943] O.R. 778 (Ont. H.C.); *Re Dawson*, (1945) 61 B.C.R. 481, [1945] 3 D.L.R. 532 (B.C.S.C.); *Re Dickinson*, (1944) 60 B.C.R. 214, [1944] 2 D.L.R. 537, [1944] 2 W.W.R. 1 (B.C.S.C.); more recent decisions which adopt a similar approach are *Re Harding*, (Unreported) B.C.S.C. decision, Vanc. Reg. No. X2152, *per* Aikins J. (1973); *Re Lowdell*, (Unreported) B.C.C.A. decision, Vanc. Reg. C.A. No. 1180/71, (1972); *Re Schiebler*, (Unreported) B.C.S.C., New Westminster Reg. No. 1099/76, July 11, 1977, per Hyde L.J.S.C.; *Re Gentile* (1964) 47 W.W.R. 382 (B.C.S.C.); *Sloane* v. *Bartley*, (1980) 7 E.T.R. 166 (Man. Q.B.), 8 E.T.R. 207 (Man. C.A.).

[78] [1931] S.C.R. 94, [1931] 1 D.L.R. 662.

[79] *Re Michalson*, [1973] 1 W.W.R. 560 (B.C.S.C.); *Re Parks*, (1968) 64 W.W.R. 586 (B.C.S.C.); *Re Tiernan*, (Unreported) B.C.S.C. decision, Vanc. Reg. No. X8473/75, (1976); *Re Sleno*, (1977) 78 D.L.R. (3d) 155 (B.C.S.C.); *Re Kalanchuk*, (Unreported) B.C.S.C. decision, Kelowna Reg. 75/76, Oct. 27, 1976, *per* Macdonald L.J.S.C.; *Re Osland*, (1977) 1 E.T.R. 128 (B.C.S.C.); *Re Holt*, (Unreported) B.C.S.C. decision, Vanc. Reg. No. X6695/74, Sept. 3, 1976, *per* Spencer L.J.S.C.; *Re Radcliffe*, (1977) 2 B.C.L.R. 220 (B.C.S.C.); *Re Berger*, (1978) 2 E.T.R. 275, [1978] 6 B.C.L.R. 241 (B.C.S.C.); *Re Slater*, (Unreported) B.C.S.C. decision, Victoria Reg. No. 0184/76, June 18, 1976, *per* Macfarlane J.; *Re Rosenbaum*, (Unreported) B.C.S.C., Vanc., Jan. 15, 1973, Dryer J.

[80] (1977) 1 B.C.L.R. 1, [1976] 6 W.W.R. 395, 72 D.L.R. (3d) 395 (B.C.C.A.).

[81] *Ibid.* 415 [D.L.R.].

[82] *Ibid.* 423 [D.L.R.].

[83] (Unreported) B.C.S.C. decision, New Westminster Reg. No. 1099/76, July 11, 1977, *per* Hyde L.J.S.C.

[84] (Unreported) B.C.S.C. decision, Vanc. Reg. No. A761476, Mar. 1, 1978, *per* Mackoff J.

[85] [1981] B.C.D. Civ. 4223-02].

[86] (Unreported) B.C.S.C. 871, Kamloops Reg., Oct. 8, 1980, Mackinnon L.J.S.C.].

[87] (Unreported) B.C.S.C. decision, Feb., 1978.

[88] (1977) 78 D.L.R. (3d) 155 (B.C.S.C.).

[89] (1978) 1 E.T.R. 128 (B.C.S.C.).

[90] (1977) 2 B.C.L.R. 220 (B.C.S.C.).

[91] (Unreported) B.C.S.C. decision, Vanc. Reg. No. A771433, May 30, 1978, *per* Macdonald J.

[92] (Unreported) B.C.S.C. decision, Vanc. Reg. No. A761476, March 1, 1978, *per* Mackoff J.

[93] (Unreported) B.C.S.C. decision, N.W. Reg. No. 2059/74, April 20, 1977 *per* Washington L.J.S.C.

[94] (1978) 2 E.T.R. 275, [1978] 6 B.C.L.R. 241 (B.C.S.C.).

a prerequisite and that *Lukie* effected no change in the law. That position has been confirmed recently by the British Columbia Court of Appeal in *Brauer* v. *Hilton*.[95]

Either approach may be justified under the Act. Those courts which require need as a prerequisite narrowly construe the phrase "proper maintenance and support." Those courts which see the Act as a means of ensuring "fair distribution" of the testator's estate interpret "proper maintenance and support" to include both the duty to provide for the present and future needs of the applicant, as well as responsibility to advance the applicant. They interpret "proper" to mean more than making provisions sufficient to enable a dependant to live decently and comfortably according to his station in life. It may also include luxuries.[96] "Proper" depends on the circumstances and is distinct from "adequate."[97] In *Re Jones*[98] it was said that the essential purpose of the Act was concerned with an equitable distribution of the estate rather than with mere maintenance. The words "just and equitable" in the subsection must be construed as going beyond proper maintenance and support. In *Barker* v. *Westminster Trust Company*,[99] the British Columbia Court of Appeal considered the Supreme Court of Canada's decision in *Walker* v. *McDermott* at some length, recognizing that that court was in favour of reading the statute as giving a wide power to redistribute the estate. Mr. Justice O'Halloran concluded that the Act gave the court power to grant two kinds of relief. The first was akin to alimony or maintenance, payable from income, and was premised on need. The second, "proper maintenance," was similar to a trustee power of advancement and was payable from the corpus of the estate. The result of the Court of Appeal's decision was to vest in the courts a kind of discretionary *legitimo portio:* the power to prevent a testator from disinheriting a spouse or child.

As one commentator has observed:[100]

> There has been a pronounced tendency for judges in British Columbia to construe this legislation as a limitation upon testamentary freedom not simply in order to provide maintenance which they think adequate, just and equitable, but to provide what they regard as a fair distribution of the estate.

So long as need is not a prerequisite for the making of an award under the *Wills Variation Act*, testators in British Columbia cannot regard their dispositions as final. Nevertheless, the courts possess a broad discretion to provide for the testator's immediate family, as the circumstances may require.

3. Finding the Obligation

The term "moral obligation" is nebulous and there is great doubt how the court is to find the obligation. A number of factors are commonly considered to determine whether the testator did owe a moral obligation to the applicant. In *Allardice* v. *Allardice*[101] these factors were set out as follows:

(1) The condition of life of the testator and his children.
(2) The sex of the children.

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[95] (1979) 15 B.C.L.R. 116 (B.C.C.A.).

[96] *Klingstal* v. *Arend et al.*, New West. Reg. C781406, Feb. 29, 1980, Proudfoot J. [1980] B.C.D. Civ. 4223-03; *Re Berger*, (1978) 2 E.T.R. 275, [1978] 6 B.C.L.R. 241 (Aikins J.); *Re Davies*, (1979) 27 O.R. (2d) 98 (Ont. Surr. Ct.).

[97] *Walker* v. *McDermott*, (1931) S.C.R. 94, [1931] 1 D.L.R. 662; *Barr* v. *Barr*, [1972] 2 W.W.R. 346 (Man. C.A.); *Re Fraser Estate*, (1964) 48 D.L.R. (2d) 334, 50 W.W.R. 268 (B.C.C.A.); *Re Parks Estate*, (1968) 64 W.W.R. 586 (B.C.S.C.); *Re Serra*, (Unreported) B.C.S.C. decision, Vanc. Reg. No. X7468-75, Feb. 2, 1978, *per* Cathcliffe J.

[98] (1961) 36 W.W.R. 337 (B.C.C.A.), *aff'd.* (1962) S.C.R. 273, (1962) 37 W.W.R. 597.

[99] [1941] 4 D.L.R. 514, 57 B.C.R. 21 [1941] 3 W.W.R. 473 (B.C.C.A.).

[100] Littman, annotation, (1977) 1 E.T.R. 128.

[101] *Supra*, n. 11; *see also Re Lawther*, [1947] 1 W.W.R. 577, 55 Man. R. 577, [1947] 2 D.L.R. 510 (Man. K.B.) for a very complete list of factors the courts should consider when making an order under dependant's relief legislation; *Re Bowr*, (1971) 19 D.L.R. (3d) 338, [1971] 4 W.W.R. 234, 19 D.L.R. (3d) 388 (B.C.S.C.).

(3) Their ages.
(4) Their state of health.
(5) Whether, if daughters, they are married.
(6) Whether, if sons, they are of sufficient health and strength to earn reasonable maintenance for themselves and those dependent on them in the condition of life in which they have been brought up.
(7) Value of the testator's estate.
(8) Interests of those who have an equal claim on the testator and who take under the will.

It is more likely that a moral obligation will be found to exist when the applicant is the only person entitled to bring an application. Where the testator accustomed his dependants to a certain standard of living, he does not act as a "judicious father seeking to discharge both his marital and parental duty" unless he makes provision in his will assisting his children to realize their "reasonable aspirations" arising out of their life style.[102] As well, a court is likely to interfere where a testator distributes his estate among his children in a grossly uneven fashion, although he is entitled to prefer one child to another.

A testamentary direction to the deceased's executors or trustees, or beneficiaries of the will, to provide in their discretion for his widow or children, is usually not regarded to be adequate provision within the meaning of the Act.[103] However, in *Re Stapleton*,[104] an Ontario Court of Appeal decision, a direction that the son should furnish the deceased's widow "with the necessaries of life according to her station in life" was held to be adequate provision. Similarly, in *Re Harper*[105] the court adjourned an application by a widow until she had applied to the deceased's executors for provision.

The court in every case will be involved in an exhaustive investigation into all aspects of the relationships between the testator, his spouse and children. The most that can be said is that each case must turn upon its facts and upon the attitude taken by the judge as to parental and marital responsibility.

4. Fulfilling Moral Obligation During Lifetime

"Moral obligation" is not something that arises on death. It is an obligation which exists during the testator's lifetime as well, but is not "enforced" until his death.

A testator's actions during his lifetime may discharge the moral obligation. In *Montgomery* v. *Flood*[106] the testator married the applicant in the Philippines. It was a marriage of convenience with the single aim of allowing the applicant to emigrate to Canada. When in Canada the testator gave the applicant money to establish her. The court held that no obligation continued beyond that and dismissed her application. In *Morris* v. *Morris*[107] the testator preferred his second wife to the children of his first marriage. On an application for relief by the children the court held that the generous provision made by the testator for the applicants during his lifetime, including the financing of their education, had discharged any moral obligation owed by the testator before his death.

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[102] *Re Fraser*, (1964) 48 D.L.R. (2d) 334, 343 (B.C.C.A.) *per* Whittaker J.A.

[103] *Re Kirk*, (1963) 42 W.W.R. 510, 38 D.L.R. (2d) 746 (B.C.S.C.); *Re Courtney*, (1958) 24 W.W.R. 676, 14 D.L.R. (2d) 376 (Sask. Q.B.); *Re Berry*,(1966) 58 W.W.R. 187 (Sask. Q.B.); *Re Hoskins*, (1961) 35 W.W.R. 430 (B.C.S.C.).

[104] [1954] O.W.N. 132, [1954] 2 D.L.R. 107 (C.A.).

[105] [1946] 3 W.W.R. 59 (B.C.S.C.).

[106] (1979) 5 E.T.R. 16 (B.C.S.C.); *see also Pulham* v. *Yorkshire Trust Co.*, [1980] 16 B.C.L.R. 80 (B.C.S.C.); *Peters* v. *Gibbins*, (1980) D.R.S. 94-374 (Ont. Surr. Ct.); *Re Foulon and Cardamone*, (1981) 9 A.C.W.S. (2d) 136 (Alta. Q.B.); *Re Gartner and Gartner*, (1982) 16 A.C.W.S. (2d) 52 (Sask. Q.B.).

[107] (Unreported) B.C.S.C. decision, (1981) 8 A.C.W.S. (2d) 19.

It is uncertain, however, how far it is possible for the deceased to discharge during his lifetime the moral obligation to provide for his family. *Morris* v. *Morris* was reversed on appeal.[108] The Court of Appeal varied the testator's will because evidence indicated he had not treated his children equally. Moreover, the testator had prepared his will in 1965, fourteen years before his death. Although it appeared the testator had reviewed his testamentary provisions from time to time, his assets increased significantly since the will was made. This decision seems to suggest that the testator should have reconsidered his obligations to his children in the light of his increased wealth.

5. Size of Award

Various tests have been put forward to determine the appropriate size of awards. In the early case of *Re Schmalz*[109] it was held that the provision should be adequate, but not necessarily limited to the portion the applicant would have received on an intestacy. Intestate portions are a legislative attempt to provide adequate provision for the deceased's next-of-kin. Several jurisdictions limit an applicant's relief to the portion he would receive on an intestacy. But this is an arbitrary and inflexible test and British Columbia courts usually regard it only as a guideline.[110] Our conclusion that *Wills Variation Act* principles should be extended to intestacies is based upon the conclusion that any scheme of intestate succession may be inappropriate in certain circumstances. We suspect that that recommendation, if implemented, will further reduce the weight to intestate portions currently given by the courts when considering *Wills Variation Act* applications.

Several factors are generally referred to in order to determine the size of the award. If the court is awarding on the basis of need, the amount is maintenance. If the surviving spouse is an applicant the test is what the applicant needs for his or her standard of living.[111] In *Re Livingston*,[112] for example, the court said that its discretion was confined to remedying a manifest breach of moral duty owed by the testator to his wife, by making an order which was sufficient, but no more, to repair it. In that case the court ordered that a trust fund be established and the income from it paid to the wife for life. The court also held that the order was in lieu of the wife's benefits under the will.[113] If the estate is small, the surviving spouse is usually entitled to all of it.[114] If the estate is large, there is no fixed standard.[115]

In *Re Deis*,[116] it was held that a testator was entitled to take into account state support, to which he had contributed through taxes, when calculating reasonable provision for a dependant child. The court made this finding in order to increase the award to the surviving spouse. The issue of dividing

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[108] (1983) 41 B.C.L.R. 239 (B.C.C.A.).

[109] (1927) 38 B.C.R. 264, [1927] 1 D.L.R. 1113, [1927] 1 W.W.R. 408.

[110] *Re Yager*, (Unreported) B.C.S.C., Kelowna Reg. No. 319/72, Mar. 26, 1973, per Kirke-Smith J.; *Re Mannion*, (1981) 11 E.T.R. 75 (Ont. Surr. Ct.).

[111] *Re Bevor*, [1950] O.W.N. 117 (C.A.); *Re Berger*, (1978) 6 B.C.L.R. 241, 2 E.T.R. 275 (B.C.S.C.); *Re Duncan*, (1975) 11 O.R. (2d) 539, 24 R.F.L. 34, 60 D.L.R. (3d) 603 (Div. Ct.); a low standard of living may not be material if assets are available to provide proper support: *Adams* v. *Broughton and Yorke*, (1982) 28 R.F.L. (2d) 108 (Alta. Q.B.); *Darough* v. *Montreal Trust Co.*, [1983] B.C.D. Civ. 4223-03.

[112] (1922) 31 B.C.R. 468, [1923] 1 D.L.R. 1167, [1923] 1 W.W.R. 628 (B.C.S.C.); *see also Re Ferguson*, (1929) 41 B.C.R. 269, [1929] 2 W.W.R. 372, [1929] 4 D.L.R. 208.

[113] *Cf. Re Hull*, [1943] O.R. 778, [1944] 1 D.L.R. 14 (C.A.) it was held that accepting benefits under the will does not prejudice the applicant's entitlement to relief. In *Re Barker*, (1983) 20 A.C.W.S. (2d) 204 (Ont. C.A.) it was held that it was not obligatory for the court to deduct testamentary benefits from an order under dependent's relief legislation. Each case must be dealt with on its facts.

[114] *Brighten* v. *Smith*, (1926) 37 B.C.R. 518 (B.C.C.A.).

[115] *Nickle* v. *Jones*, [1974] 3 W.W.R. 385 (Alta. S.C.); *inter vivos* distribution of family assets on marital breakdown directed by statute has been expressly rejected as a standard for determining entitlement under the *Wills Variation Act*: *Richards* v. *Person*, (1980) 20 A.C.S.W. (2d) 315 (B.C.C.A.).

[116] (1983) 13 E.T.R. 88 (Sask. C.A.).

private and public responsibility for a deceased's dependant is a difficult one. In *Re Deis*, the courts found that the public should assume responsibility for a dependant because the estate was small and required to maintain the surviving spouse. In *Re Millar*,[117] the court refused to make an award for an applicant child incapable of supporting himself, since it would terminate the applicant's welfare assistance resulting in no benefit to him.

The Alberta Institute of Law Research and Reform has made the following observations:[118]

> It is exceedingly difficult to define the boundary between public and private responsibility for the support of a person who qualifies as a dependant under the statute. Where the estate is large, we see no reason why provision should not be made out of a parent's estate for the support of a disabled child. It may be somewhat anomalous that during the parent's lifetime the Province did not enforce the parent's obligation for support but does so at death. However, the deceased no longer has a need for his assets and, if his estate is large, the competing claims for a share of his estate may all be satisfied. Where the estate is small and there are competing claims which cannot be satisfied, we feel that a judge may properly dismiss the application on behalf of a disabled person who is receiving support from the Province. We therefore recommend that the financial responsibility assumed by a government for a mentally or physically disabled dependant should be one of the factors which is taken into account in determining whether an order should be made.

It is arguable that this is a factor the courts already take into account. There is no need for a specific direction to consider whether there is public funding for a dependant. In the usual case, if the estate is large, or there is no other claimant, public financial assistance should be irrelevant. The courts seem to take these factors into consideration only in circumstances where it is reasonable to do so.

E. Orders Under the Act

1. Relevant Time for Determining Relief Under Act

Four different times have been suggested by courts as appropriate to determine whether adequate provision was made in the will for an applicant. These are:

(a) the date the testator made his will;[119]
(b) the date of the testator's death;[120]
(c) the date *Wills Variation Act* proceedings are commenced;[121]
(d) the date of the hearing.[122]

Whichever date is appropriate for determining the adequacy of the testator's provisions, it is clear that a court may consider circumstances which the testator could have reasonably foreseen, and which he therefore should have taken into account in providing for the applicant.[123] Unless the courts choose

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[117] (1977) 71 D.L.R. (3d) 120 (P.E.I.S.C.).

[118] *Supra*, n. 8, at 44.

[119] *Re Hull*, [1944] 1 D.L.R. 14, [1943] O.R. 778 (C.A.).

[120] *Re Brown*, (1969) 70 W.W.R. 543 (Sask. Q.B.); *Re Novikoff*, (1968) 66 W.W.R. 164, 1 D.L.R. (3d) 484 (B.C.S.C.); *Re Bowe*, [1971] 4 W.W.R. 234, 19 D.L.R. (3d) 338 (B.C.S.C.); *Dun v. Dun*, [1959] A.C. 272, [1959] 2 All E.R. 134 (P.C.); *Millward v. Shenton*, [1972] 1 W.L.R. 711, [1972] 2 All E.R. 1025 (C.A.); *Walker v. McDermott*, [1930] 1 D.L.R. 945, 42 B.C.R. 184, [1950] 1 W.W.R. 332 (C.A.), *rev'd.* on other grounds [1931] S.C.R. 94, [1931] 1 D.L.R. 662.

[121] *Barker v. Westminster Trust Co.*, [1941] 4 D.L.R. 514, 57 B.C.R. 21, [1941] 3 W.W.R. 473 (B.C.C.A.); *Re Calladine*, (1958) 25 W.W.R. 175 (B.C.S.C.).

[122] *Re Jones (No. 3)*, [1934] 3 W.W.R. 726, 49 B.C.R. 216 (In Chambers); *Re Willan*, (1951) 4 W.W.R. (N.S.) 114 (Alta. S.C.); *Re Urquhart*, (1956) 20 W.W.R. 177, 5 D.L.R. (2d) 235 (B.C.S.C.); *Re Martin*, (1962) 40 W.W.R. 513, 36 D.L.R. (2d) 507 (Man. C.A.); *Maldaver v. Can. Perm. Tr. Co.*, (1977) 1 E.T.R. 41 (N.S.S.C.); *Maldaver v. Canada Permanent Trust Co.*, (1982) 29 R.F.L. (2d) 147 (N.S.S.C.); *Malychuk v. Malychuk; Taschuk v. Malychuk*, (1978) 6 Alta. L.R. (2d) 240, 11 A.R. 372 (T.D.); *Harris v. Hardy*, (Unreported B.C.S.C. decision, Van. Reg. No. C804612, Jan. 28, 1982, *per* Meredith J.), [1982] B.C.D. Civ. 4223-06, (1982) A.C.W.S. (2d) 10.

[123] *Re Willan, ibid. Re Rusk*, (1957) 21 W.W.R. 68, 6 D.L.R. (2d) 700 *rev'g.* 19 W.W.R. 474 (Sask. C.A.); *Re Frinskie*, (Unreported) B.C.S.C. decision, Sept. 18, 1979, (1980) D.R.S. 94-398.

the hearing as the relevant date, however, unexpected changes in circumstances which manifest themselves by the hearing may not be considered. It is unreasonable to award maintenance to an applicant as if he were healthy and employed, if, since the testator's death, he has been paralyzed and requires medical attention. Professor Bale argues:[124]

> The [statutes direct the courts to] determine whether adequate provision has been made for dependants and [further provide that] if the testator has not done so, the court is to do so. The emphasis on the moral duty of the testator simply obscures the issue. If the courts confine their attention to determining whether adequate provision has been made for dependants, the relevant time seems to be the date of application or the date of hearing, both as to the circumstances of the applicant and as to the value of the assets.

The Law Reform Commission of New South Wales, recommended that the date of hearing should be the relevant time. The Commission said:[125]

> In our view, no reasonable man will object to the court having power to do for him what it is likely he would have done himself, if he had lived long enough.

A related question is which date should be used to value the estate. In *Re Novikoff*,[126] it was held that the estate should be valued at the testator's death because that date was certain, and moreover was the last date on which the testator could reasonably be expected to have acted the part of the judicious father of the family. Apart from the justification given in *Re Novikoff* there is no logical reason for the courts ignoring the actual value of the estate at the time of making the order, in favour of some quite different value it might have had at the time of the testator's death. Professor Litman has observed[127] that the uncertainty in the law suggests a real danger that "posthumous changes in circumstances will not be considered in determining adequacy." These are matters which, if only for consistent results, require clarification by legislation.

2. Nature of the Order

Section 3 of the *Wills Variation Act* provides:

> **Court may make order subject to conditions**
>
> **3.** The court may attach the conditions to the order that it thinks fit, or may refuse to make an order in favour of a person whose character or conduct, in the court's opinion, disentitles him or her to the benefit of an order under this Act.

Section 4 of the *Wills Variation Act* provides:

> **Lump sum or periodical payments**
>
> **4.** In making an order the court may, if it thinks fit, order that the provision shall consist of a lump sum or a periodical or other payment.

The courts enjoy a wide discretion to make lump sum or periodical orders subject to such conditions as "it thinks fit." There is little practical restriction on the orders which a court may make. Whether a court will award a lump sum or periodic payments depends in large part upon how it views the function of the Act. Periodic payments promote the maintenance and support aspects of the legislation.[128] Entitlement to lump sum payments suggests that the applicant possesses something akin to a proprietary interest in the assets of the estate. In *Re McCaffery*,[129] it was said that lump sum payments should only be given when the making of periodical payments will seriously embarrass the executors and unduly prolong distributing and winding up the estate.

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[124] *Wills and Estate Planning*, (1971-2) 5 Ottawa L. Rev. 555, 570.

[125] Report on *The Testator's Family Maintenance and Guardianship of Infants Act, 1916*, (No. 28), 1977, 37.

[126] (1968) 66 W.W.R. 164, 1 D.L.R. (3d) 484 (B.C.S.C.); *cf. Harris v. Hardy*, (Unreported B.C.S.C. decision, Van. Reg. No. C804612, Jan. 28, 1982, *per* Meredith J.), [1982] B.C.D. Civ. 4223-06, (1982) 13 A.C.W.S. (2d) 10.

[127] (1977) 1 E.T.R. 41, 46; *see also Re Williams*, (1983) 13 E.T.R. 163 (Man. Surr. Ct.).

[128] *See, e.g., Re Livingston*, (1922) 31 B.C.R. 468, [1923] 1 D.L.R. 1167, [1923] 1 W.W.R. 628 (B.C.S.C.); *Re Hall*, (1923) 33 B.C.R. 241 (B.C.S.C.).

[129] [1931] O.R. 512, [1931] 4 D.L.R. 930 (C.A.).

3. Incidence of the Order

Sections 5 through 9 of the Act provide:

Payments fall rateably on estate

5. The incidence of the payments ordered shall, unless the court otherwise determines, fall rateably on the whole estate of the testator, or in cases where the authority of the court does not extend or cannot, directly or indirectly, be made to extend to the whole estate, then to so much of it as is situated in the Province.

Power to release part of estate

6. The court may exonerate a part of the testa tor's estate from the incidence of the order after hearing those of the parties that may be affected by the exoneration that it considers necessary, and may for that purpose direct any executor or trustee, or appoint any person, to represent any of those parties.

Power of court to allow commutation

7. The court may at any time fix a periodic payment or lump sum to be paid by a legatee or devisee, to represent, or in commutation of, the proportion of the sum ordered to be paid that falls on the portion of the estate in which he is interested, and exonerate that portion from further liability. The court may direct how the periodic payment shall be secured, to whom the lump sum shall be paid and how it shall be invested for the benefit of the person to whom the commuted payment was payable.

Representative action

8. (1) Where an action has been commenced on behalf of a person, it may be treated by the court as, and so far as regards the question of limitation shall be deemed to be, an action on behalf of all persons who might apply.

(2) A plaintiff in an action shall, within 10 days after the issue of the writ of summons, register a certificate of lis pendens in the form prescribed under section 213 of the *Land Title Act* against the land sought to be affected in the land title office in which the title to the land is registered.

Effect of order

9. On an order being made under this Act, the portion of the estate comprised in it or affected by it shall be held subject to the provisions of the order, but the order does not bind land unless it is registered as a charge against the land affected in the land title office in which the title to the land is registered.

The general rule is that payments pursuant to a *Wills Variation Act* order fall rateably upon the whole estate. The "whole estate" means the value of the deceased's estate after deduction of the liabilities of the estate, including administrative expenses.[130] The order binds that portion of the estate out of which payment is to be realized, without further action by the parties affected, with the exception of land. To charge land, the order must be registered in the land title office.

The court is granted two separate powers to release part of the estate from the effect of the order. Section 5 provides by implication that the court may relieve any part of the estate from the incidence of the payment. Section 6 specifically provides the power to exonerate portions of the estate. The overlapping nature of these two provisions suggests an excess of caution on the part of the draftsman when creating the power to exonerate.

Where the court is asked to relieve any particular part of an estate from bearing a proportionate share of an order, the onus is on the person claiming the relief to show that it is fair and equitable that his share be relieved.[131] One factor the courts will consider in determining whether exoneration would be fair and equitable is the scheme of distribution contained in the will. The testator may indicate expressly or implicitly whether a particular portion of the estate should bear the burden of an order.[132] Often this is a question which is resolved by reference to the status of the parties involved. A child requesting a

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[130] *Royal Trust Co. v. Dowsett*, (1980) 8 E.T.R. 229 (Nfld. C.A.)

[131] *Re Randle*, [1976] 6 W.W.R. 230, 71 D.L.R. (3d) 208 (Alta. C.A.); *Timbers v. Daniel et al.* (unreported) B.C.S.C. decision, Vanc. Reg. No. A771917, Apr. 20, 1978, *per* Murray J.

[132] *Ibid.*

portion of a small estate will be unlikely to share in the portion of the surviving spouse. It is more likely the child, if successful, would share in the residue of the estate, or in the portion given to other children of the testator or to other beneficiaries more remote than the applicant.

Section 7 is designed to avoid breaking up or converting a legacy or bequest, when it may be inconvenient, costly or otherwise undesirable, in order to bear its burden of the order. The court may make provisions for payment by a beneficiary by means other than the sale of an asset devised or bequeathed under the will.

4. Interim Orders

In the absence of specific statutory authority, courts have no power to make interim maintenance orders under the *Wills Variation Act*.[133] The British Columbia Act does not contain such provision. Nor may a potential applicant charge his anticipated interest as security for a loan to provide maintenance. The Act specifically provides that such a charge is invalid.[134] Other jurisdictions have enacted provisions permitting the court to make interim orders where need is shown in advance of the hearing.[135] Since need is a significant factor in determining whether an applicant is entitled to relief, it will not be unusual to find that an applicant may be in immediate need of financial assistance pending the hearing.

5. "Suspensory" Orders

In New Zealand, it has been held that the testator cannot be said to have provided adequate support and maintenance[136] if, on the basis of conditions already apparent, an applicant of independent means will require assistance in the future. In *Re Purish*,[137] the New Zealand court was of the view that an applicant who would require future assistance had the right to come to court before being barred by limitation. The court made an order which charged the testator's estate with the burden of any future order. These kinds of orders are called "suspensory" because they suspend distribution of the estate.

The practice of making suspensory orders was disapproved by the New Zealand Court of Appeal in *Welsh* v. *Mulcock*[138] because of the inconvenience which results from suspending indefinitely the administration of the testator's estate. However, when the widow in *Toner* v. *Lister*[139] applied to the court because she was unable to support herself, it was held that the statements in *Welsh* v. *Mulcock* disapproving suspensory orders did not have the full authority of the New Zealand Court of Appeal. The question of whether a New Zealand court can make an order charging the testator's estate with the burden of future orders is unsettled. Later cases hold that such a discretion exists.[140]

The question of suspensory orders was considered in British Columbia by Mr. Justice Robertson in *Re Ramsey Estate*.[141] His Lordship, following the New Zealand authority referred to above, made a suspensory order to charge

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[133] *Re Brandner* [1971] 1 O.R. 49, 14 D.L.R. (3d) 385 (C.A.); *cf. Re Gilbert* (1975) 22 R.F.L. 292 (Ont. S.C.).

[134] Section 13.

[135] *E.g.* England.

[136] *Colquhoun* v. *Public Trustee* (1911) 31 N.Z.L.R. 1139, (1911) 14 N.Z.G.L.R. 432; *De Renzi* v. *De Renzi*, (1915) 17 N.Z.G.L.R. 620.

[137] [1916] N.Z.G.L.R. 467; *see also Jones* v. *Lister* [1919] N.Z.G.L.R. 498; *Blackburn* v. *Mapp* [1917] N.Z.L.R. 565.

[138] [1924] N.Z.L.R. 673.

[139] [1925] N.Z.L.R. 321, the widow, who had been granted a suspensory order in 1919, applied to the court again because, due to age and infirmity, she was unable to support herself.

[140] *E.g. Re Birch*, [1929] N.Z.L.R. 863; *Orr* v. *Public Trustee* [1930] N.Z.G.L.R. 227.

[141] [1935] 2 W.W.R. 508, 50 B.C.R. 83 (B.C.S.C.).

the capital of the estate with a view to making a further order for payment in favour of the testator's wife, infant daughter (who was of unsound mind and hospitalized) and adopted infant son. This order was made notwithstanding that its effect was to deprive indefinitely other beneficiaries of their interests under the will.

Following his own decision, Mr. Justice Robertson also made a suspensory order in *Re Pridmore*.[142] In other early cases concerning Canadian dependant's relief legislation, the courts have made suspensory orders. In *Re Hannah*,[143] the Ontario Court of Appeal dismissed an applicant's appeal but gave her leave to renew her application at a later date when need could be more readily established. In *Re Morton*,[144] the applicant wife was given leave to make future applications as necessary.

In more recent cases this power has been curtailed. Mr. Justice Wootton, in *Re Savannah Estate*,[145] was careful to restrict the jurisdiction of the court to make such orders:

> Mr. Young for the infants submitted that the words "liberty to apply" should be added in this matter . . . . The question arises, therefore, after consideration of the authorities as to what the order made upon this application is to be. If it is to be appealed there must be some finality about it. There is, of course, an appeal from orders made under the *Testator's Family Maintenance Act*. If "liberty to apply" is to be permitted then the order is a suspensory order, unless that liberty is to extend only to the mechanics of the order . . . . But surely "liberty to apply" should not be granted in all cases, thus perhaps enabling a party to say there is nothing to appeal because there is still "liberty to apply" for more or even less as the case may be. In my opinion, the order made by the judge in the first instance should not be other than a "final order" but where there are special reasons "liberty to apply" or similar words of reservation for further consideration may be added.

In *Re Finnimore*,[146] a decision of the Saskatchewan Court of Appeal, it was held that the courts had no jurisdiction to make a suspensory order. Because the Saskatchewan Act, which is similar to the British Columbia Act, does not expressly permit suspensory orders, it must be taken to authorize only the making of a final order. There cannot be subsequent applications. Presumably this decision would be persuasive in British Columbia.

Power to make a suspensory order would allow the courts to make provision for applicants taking into account changed circumstances. It could also, in many cases, delay administration of the estate, and prejudice the interests of beneficiaries under the will.

6. Class Orders

Although under the Act, an application brought by one party is deemed to be on behalf of all entitled applicants, the courts consider the claims of individuals, not those of a class. Any claim, however, is considered in the context of all the circumstances: the size of the estate, the relationship to the testator of beneficiaries under the will, and the testator's legal and moral obligations to other applicants and to other dependants not mentioned in the will who have no right to apply. In some cases, where the court considers the claims of several applicants, all of whom possess similar attributes, an effective way of dealing with the applications is to make a class order. A fund

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[142] [1936] 1 W.W.R. 390, (1935) 50 B.C.R. 300 (B.C.S.C.).

[143] (1931) 39 O.W.N. 499 (C.A.).

[144] (1934) 49 B.C.R. 172, [1934] 3 W.W.R. 719 (B.C.S.C.).

[145] (1963) 43 W.W.R. 569, at 570-1 (B.C.S.C.).

[146] (1956) 17 W.W.R. 668, 1 D.L.R. (2d) 725, *see also Muldarver* v. *Canada Permanent Trust Co.* (1982) 29 R.F.L. (2d) 147 (N.S.S.C.). Periodic payments from the investment of a lump sum may resemble in result the effect of a suspensory order: *see, e.g., Re Albert*, (1982) 13 E.T.R. 149 (Alta. Q.B.).

in favour of a class, administered by a trustee who may apply the funds for the benefit of its members as circumstances require, is a highly flexible tool.

In British Columbia, it would appear, class orders are not made. Whether this is because the courts do not favour them or lack the jurisdiction to make them is not certain. In New Zealand, it has been held that the courts do not have jurisdiction to make an order setting up a trust fund in favour of a class of applicants. In *Re Maxwell*, the New Zealand Court of Appeal said:[147]

> We are impressed by the practical propriety and wisdom of the order of the trial Judge setting aside a fund in the hands of a trustee for the benefit of the grandchildren as a class giving the trustee discretion as to the actual application as between the beneficiaries of the income of the fund and directing the ultimate division of the unexhausted surplus among such of his grandchildren as shall live to attain 21 years, in equal shares. But we regret that we cannot agree with the learned Judge in the Court below as to the authority to make what has been sometimes called "a class order."

The New Zealand Court of Appeal found that the courts had no jurisdiction under their Act to grant a class order. The power to grant a class order must be specifically provided by legislation.

7. Variation of Orders

Section 13 of the British Columbia Act gives the court power to vary its own orders. It provides:

> **Court may discharge or vary order**
>
> **13.** Where the court has ordered periodic payments, or that a lump sum be invested for the benefit of a person, it may inquire whether at any subsequent date the party benefited by its order has become possessed of or entitled to provisions for his proper maintenance or support, and into the adequacy of those provisions, and may discharge, vary or suspend its order, or make another order that is just in the circumstances.

This power is exercised in situations where a capital sum has been set aside and invested for an applicant, or where periodic payments are made. As a general rule, periodic payments are made out of a capital sum set aside pursuant to the court's order.

The power is rarely if ever used. One can easily appreciate that no problem is likely to arise if the court decides to decrease either the sum invested or the amount of periodic payments. The amount by which the award is reduced would fall back into the estate for distribution.

An application to increase an award may cause many problems. The estate may have been distributed. It is unlikely the court could order beneficiaries to return legacies. The burden of such an order would tend to fall on the undistributed portion of an estate, prejudicing the interests of beneficiaries who had not yet received their interests, notwithstanding the general rule that payments are to fall rateably upon the entire estate. Neither compelling beneficiaries to return legacies, nor letting the burden fall on some beneficiaries and not others, has much to commend it. Only in very rare cases would a court increase the amount set aside by an order.[148]

The section suggests that the Act is primarily directed to providing maintenance, not to making "reasonable" distributions of a testator's estate. The focus is upon varying an order according to the need of the applicant. Presumably its intended purpose is to deprive the beneficiary of payments under the Act which are no longer required.

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[147] [1954] N.Z.L.R. 720.

[148] *See, e.g., Re Morton*, (1934) 49 B.C.R. 1972, [1934] 3 W.W.R. 719; *Re Prudmore*, [1936] 1 W.W.R. 300 (1935), 50 B.C.R. 300; *quaere* whether an award can be varied upwards only when leave is given in original order; *Re Fennimore (Ind. Quaere* whether there is a fundamental inconsistency with determining adequacy of provision at deceased's death: *see Maldaver v. Canada Permanent Trust Co., (ind. Re MacIntosh*, (1982) 17 A.C.W.S. (2d) 229 (Ont. Surr. Ct.) on variation due to changes in estate's value.

8. Assets Subject to the Order

Under the Act "adequate, just and equitable" provision is to be made out of the "estate" of the testator.[149] Many gaps exist permitting avoidance of the provisions of the Act. Indeed, when the New Zealand Bill was at second reading a member of the New Zealand House of Representatives asked:[150]

> Whether the honourable member as a lawyer, could not see his way to drive a coach and four horses through the Bill if it became law . . . . It was quite possible for him before he died, to transfer the whole of his property to certain sons or daughters, or to trustees for certain persons and then leave no provision for his wife.

Several simple devices may be employed to avoid the provisions of the Act. Most relate to *inter vivos* transactions, the effect of which is to remove an asset from the estate. The only factor which may restrain a testator from dispersing his estate is the fear that a gift too hastily made could deprive the testator of the use of assets during his life.

Pension benefits which are payable directly to a designated beneficiary do not form part of the estate for the purposes of the Act.[151] Neither do insurance proceeds form part of the "estate" of the testator, unless the deceased's estate is the beneficiary of the policy, and therefore are not subject to disposition under the Act.[152] In *Kerslake* v. *Gray*,[153] the Supreme Court of Canada held that the sole source from which any allowance granted under the Act is to be satisfied is the assets to which the creditors of the estate are entitled to look. However, this is not an apt analogy. In *Re Brill*[154] it was said that an applicant under the Act was not a creditor of the estate. The statute was passed to empower the court to ensure that adequate provision had been made for the maintenance of an applicant and the applicant's status must be considered in that light. In one significant respect applicants are not equal to creditors of the estate: applicants may not look to the assets of the estate which have already been distributed. In *Re Brill* the executrix paid herself as beneficiary under the will her portion of the estate. This was held to constitute distribution. The assets distributed were not available to satisfy an order made in favour of the applicant.

Insurance proceeds may not be considered as part of the estate for purposes of valuation and calculation of the portion which should be paid to the applicant from the estate's assets.[155] However, assets which do not form part of the estate may be considered in determining the entitlement of an applicant. A benefit conferred by *inter vivos* transaction received by a party resisting an applicant's claim may be a factor in favour of giving a greater share of the estate to the applicant. In *Simpson* v. *Willis*[156] the applicant was the son of the deceased. The deceased's surviving spouse (the applicant's father) had received approximately $122,000 by right of survivorship in property held in joint tenancy. The court awarded the son the entire estate, which was valued at approximately $31,000. Similarly, an applicant benefitted by an *inter vivos* transaction may not be entitled to succeed under the *Wills Variation Act*. The *inter vivos* gift may satisfy the testator's "moral obligation" to provide for the applicant in his will.[157]

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[149] Section 2(1).

[150] N.Z. Parl. Debates, (1900) vol. 3, p. 507, cited by G. Bale, "Limitations on Testamentary Dispositions in Canada," (1964) 42 C.B.R. 367, 383.

[151] *Berezowsky* v. *Berezowsky*, (1975) 23 R.F.L. 26 (Sask. Q.B.).

[152] *Re Dalton* v. *Macdonald*, [1938] 1 W.W.R. 758, 52 B.C.R. 473 (B.C.C.A.).

[153] [1957] S.C.R. 516, 8 D.L.R. (2d) 705 (Ont.).

[154] [1967] 2 O.R. 586, 64 D.L.R. (2d) 478.

[155] *Re Gilbert*, (1965) 51 W.W.R. 701 (Sask. Q.B.).

[156] (Unreported) B.C.S.C. decision, Vanc. Reg. No. C771449, May 4, 1978, *per* Aikins J.

[157] *Re Maxwell*, (1961) 38 W.W.R. 23, 34 D.L.R. (2d) 778 (Sask. Q.B.).

Another method of evading the Act is for the testator to make gifts immediately before his death. In *Dower and Dower* v. *The Public Trustee*[158] the testator made gifts *inter vivos* of a total value of approximately one million dollars. Those gifts impoverished the testator and rendered illusory the widow's right to relief under the Alberta *Family Relief Act*, the Alberta counterpart of the British Columbia *Wills Variation Act*. In holding that the widow could not set aside the gifts, and that the widow could not look to the money transferred to the donees for provision for her support and maintenance, Riley J. stated:[159]

> It may well be socially undesirable to allow a husband to deliberately impoverish himself by denuding himself of well nigh all his assets during his lifetime, to the point that an application for relief under the *Family Relief Act* would be abortive, and I quite concede that the State may well have an interest to seeing that a husband carries out his responsibilities for the support of his wife and his dependents, both during his lifetime and following his death — an interest in the avoidance of penury, an interest in a workable Family Relief Act. That, of course, is a matter for the Legislature and not for the Courts.

The testator may avoid impoverishing himself by giving his property away subject to its being returned should he survive. This is called a *donatio mortis causa*. To be valid, the gift must be made in contemplation, though not necessarily in the expectation, of death.[160] A *donatio mortis causa* has been described in the following way:[161]

> A donatio mortis causa is a singular form of gift. It may be said to be of an amphibious nature being a gift which is neither entirely inter vivos nor testamentary. It is an act inter vivos by which the donee is to have the absolute title to the subject of the gift not at once but if the donor dies. If the donor dies the title becomes absolute not under but as against his executor. In order to make the gift valid it must be made so as to take complete effect on the donor's death. The Court must find that the donor intended it to be absolute if he died, but he need not actually say so.

Actual possession of the item must be obtained by the donee.[162] Delivery may be on trust as specified in the gift.[163] There is some authority that realty cannot be the subject of a *donatio mortis causa*.[164] In a gift *mortis causa* the testator has the best of both worlds. If he lives, the gift is void. If he dies, the gift is effective and an application by his dependants under the *Wills Variation Act* would not attach to the subject matter of the gift, since it would not be part of the deceased's estate.

In considering an estate, the court may not have regard to property held on terms which do not permit transmission through the estate. For example, property held in joint tenancy is subject to a *jus accrescendi*, or right of survivorship. The interest of a deceased joint tenant vests automatically in the surviving joint tenant by operation of law. Property held in joint tenancy does not therefore form part of the estate.[165] A testator may also transfer money during his lifetime to trustees in trust for himself for life, remainder to specified individuals, or perhaps even for individuals to be appointed by will. Such a transaction also has the effect of removing the property, which is

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[158] (1962) 35 D.L.R. (2d) 29, 38 W.W.R. 129 (Alta. S.C. App. Div.).

[159] *Ibid.* 40 [D.L.R.].

[160] *Thorne* v. *Perry*, (1900) 2 N.B. Eq. 146, *aff'd.* 35 N.B.R. 398; *Kendrick* v. *Dominion Bank*, (1921) 58 D.L.R. 309 (Ont. C.A.); *Kramer* v. *Kramer*, (1979) 100 D.L.R. 76 (B.C.S.C.); *Lumsden* v. *Miller*, (1980) 110 D.L.R. (3d) 226 (Alta. Q.B.).

[161] *Re Beaumont*, [1902] 1 Ch. 889, 892, *per* Buckley J.

[162] *Ward* v. *Bradley*, (1901) 1 O.L.R. 118 (C.A.); *Re Reid*, (1921) 64 D.L.R. 439, 50 O.L.R. 595 (C.A.).

[163] *Ibid.*

[164] *Re Roach*, (1905) 10 O.L.R. 208 (Chambers).

[165] *Re Maxwell*, (1961) 38 W.W.R. 23, 34 D.L.R. (2d) 778 (Sask. Q.B.); *Simpson* v. *Willis*, *supra*, n. 155; *Albert* v. *Albert, Miller and Steinke*, (1983) 24 Alta. L.R. (2d) 258 (Q.B.).

subject to the trust or power of appointment, from the estate for the purposes of the *Wills Variation Act*.[166]

A testator may also avoid the provisions of the Act by making a binding agreement in his lifetime to devise part of his estate by will. Initially the Privy Council held that such an agreement did not limit or restrict the power of the court to grant relief if it considered that inadequate provision had been made for a member of the testator's family.[167] In *Schaefer* v. *Schuhmann*,[168] however, the Privy Council declined to follow its earlier decision, relying in part on the criticism expressed in two Canadian decisions.[169] The courts will give effect to a contract to leave by will notwithstanding its effect is to render nugatory a dependant's right to apply for support and maintenance.

Even if the testator does not intend to evade the Act, property is not caught which perhaps ought to be. As a matter of policy, it is arguable that property transferred pursuant to agreements which are analogous to testamentary devises should also be subject to the terms of the *Wills Variation Act*. On the other hand trusts, contractual agreements, pension benefits, and insurance monies are often used as part of a scheme of estate planning, and to interfere with these transactions could conceivably have the effect of attracting tax which would otherwise not be payable.

F. Procedure

1. Commencement of Application

An application under the Act is commenced by writ of summons.[170] In *Re Koza*[171] it was said that proceedings under the Act were intended to be reasonably informal, and there was no requirement that the application had to be in any particular form. Nevertheless, the writ must specifically claim relief under the *Wills Variation Act*. In *Re Elliot*,[172] the application was brought under the general style of cause "and in the matter of a claim by Laura Elsie Elliott for maintenance" but failed to claim for relief under the Act. The omission was fatal. As well, the application under the *Wills Variation Act* should stand alone. In *Re Hovdebo*,[173] it was held that an application to change executors was not properly joined to an application under the Act.

The action must be commenced within six months of the "issuance of probate of the will."[174] In *Re Hirsch*,[175] Hinds L.J.S.C. held that "issuance of probate" means the date upon which the grant of letters probate is entered in the court registry. In an earlier British Columbia decision, *Re Pedlar*,[176] it was held that the six months were to be calculated from the sealing of the grant. Technically "entry" differs from "sealing," but for all practical purposes the time determined by either test is the same. This provision does not restrict commencing an action before the issuance of probate.[177]

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[166] *Collier* v. *Yonkers et al.*, (1967) 61 W.W.R. 761 (Alta. S.C. App. Div.)

[167] *Dillon* v. *Public Trustee of New Zealand*, [1941] A.C. 294, [1941] 3 W.W.R. 865, [1941] 2 All E.R. 284, *rev'g* [1939] N.Z.L.R. 550, which *rev'd*. [1938] N.Z.L.R. 693 (P.C.)

[168] [1972] 1 All E.R. 621.

[169] *Olin* v. *Perrin*, [1946] 2 D.L.R. 461 (Ont. C.A.), *Re Willan Estate*, (1951) 4 W.W.R. 114 (Alta. S.C.)

[170] Section 10.

[171] (1980) 32 W.W.R. 575 (B.C.S.C.)

[172] (1941) 56 B.C.R. 178, [1941] 2 D.L.R. 71, [1941] 1 W.W.R. 356, *aff'd*. (1941) 56 B.C.R. 465, [1941] 4 D.L.R. 203, [1941] 3 W.W.R. 877 (B.C.C.A.)

[173] (1963) 45 W.W.R. 640 (Sask. Q.B.)

[174] Section 10 (a).

[175] (1977), 76 D.L.R. (3d) 558 (B.C.S.C. in Probate)

[176] (1933) 46 B.C.R. 481, [1933] 1 W.W.R. 267 (B.C.S.C.)

[177] *Re Stafford*, (1979) 26 N.B.R. (2d) 561, 55 A.P.R. 561 (Q.B.), *Re Jefferson, Marguitred* v. *Stewart*, (1938) 54 B.C.R. 172, [1939] 3 D.L.R. 680, [1939] 3 W.W.R. 106 (B.C.C.A.)

There is no provision in the British Columbia Act for extending the limitation period. There is authority from other jurisdictions on similar legislation which holds that the absence of a statutory power to extend the six month period means that the courts have no jurisdiction to entertain an application beyond that time.[178] In some jurisdictions the courts have been given power to extend the limitation period. For example, in England the courts possess an unfettered discretion to extend the time within which application must be made, in order to avoid hardship.[179]

In jurisdictions where the courts may extend the limitation period, certain restrictions apply. The application to extend should not be brought *ex parte*.[180] It is material to consider how promptly the extension was sought and whether there were reasons to justify the delay in applying for relief.[181] In *Re DeRoche*,[182] the application was brought 14 years after probate. An extension was granted because the applicants were infants at the time of the testator's death, and their mother who had received the estate, had progressively become more difficult to live with. In *Re Stewart*,[183] it was said that delay alone is insufficient reason to refuse extension:[184]

> Where . . . the applicant is the only person within the statutory class of dependents, and no reason is offered as to why the application should not be permitted to be heard beyond the mere delay, it would appear to be inequitable not to extend the time.

In jurisdictions where the courts possess power to extend the limitation period, no claim is maintainable outside of the limitation period after the estate has been distributed.[185] An order made pursuant to an application commenced within the six month period will attach to all the assets of the estate, notwithstanding distribution. In jurisdictions where the courts possess power to extend the limitation period an order made pursuant to an application commenced outside the six month period will attach to undistributed assets only.[186]

Provided the application is initiated within six months of the issuance of probate, there is no requirement that the hearing actually be held within the six months.[187] Neither is there any requirement that the writ be served within the six months. This could be the cause of some inconvenience:[188]

> It would appear that the Act or Rules require some amendment. Neither the Rules passed pursuant to the Act, nor the Supreme Court Rules, which apply where the Rules under the Act are silent, make any provision for service of the petition within a definite time after filing. Sec. 12 of the Act prohibits the executor from distributing the estate until the expiration of six months from the issuance of probate. Presumably, the executor may distribute immediately thereafter. No difficulty would arise where the petition is promptly served, but a petition may be filed on the last day and not served until a month thereafter. The executor, having no notice of the petition, might in the meantime have distributed the estate. Perhaps in such a case the applicant would be obliged to suffer the consequences of his own delay, but it seems to me that a simple amendment to the Act or Rules,

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[178] *Buzogan* v. *Bannister*, [1972] 1 W.W.R. 1 (Alta. S.C.).

[179] Martyn, *The Modern Law of Family Provision* (1978) at 7; *Theobald on Wills*, (13th ed.), 326.

[180] *Re Hall*, [1943] O.R. 778, [1944] 1 D.L.R. 14 (C.A.); *Re Jervis*, [1954] O.W.N. 48 (C.A.); *Re Weir*, [1963] 1 O.R. 53 (C.A.).

[181] *Re Salmon*, [1980] 3 All E.R. 532, [1980] 3 W.L.R. 748 (Ch.D.); *Re Coventry*, [1979] 3 All E.R. 815 (C.A.).

[182] (1964) 49 W.W.R. 761, *aff'd* (1965) 51 W.W.R. 120 (Sask. Q.B.).

[183] [1944] O.W.N. 380 (C.A.).

[184] *Ibid.* at 381 *per* Kellock J.A.

[185] *Re Phillips*, (1973) 8 N.B.R. (2d) 188; *Re Salmon*, *supra*, n. 181; *Re Marcellus*, (1982) 13 A.C.W.S. (2d) 386 (Ont. Surr. Ct.).

[186] *Gilles* v. *Althouse*, [1976] 1 S.C.R. 353, [1975] 5 W.W.R. 547, 53 D.L.R. (3d) 410; *Re Denninger*, (1982) 10 E.T.R. 6, (1982) 128 D.L.R. (3d) 613 (Ont. Surr. Ct.).

[187] *Re Brown Estate*, (1956) 19 W.W.R. 616 (B.C.S.C.); *Re Stafford*, (1979) 26 N.B.R. (2d) 561, 55 A.P.R. 561 (Q.B.).

[188] *Ibid.* at 617-8.

providing that the petition must be served within a specified time, would prevent such a situation, with its consequent uncertainty, arising.

A writ commencing an application for relief must be served upon the executor of the will.[189] Where there are minor children involved, or a potential beneficiary is mentally disordered, the writ must also be served upon the Public Trustee.[190]

At one time a judge of the County Court had no jurisdiction to order provision for dependants under the Act.[191] Under the current provisions of the *County Court Act*, however, a County Court judge may exercise this jurisdiction.

2. Suspension of Distribution

Under section 11 distribution of an estate cannot commence within six months of the issuance of probate without the consent of all potential applicants or of the court. Where distribution is made within the six months, it is at the peril of the individuals receiving the interests under the will.[192] The section specifically provides that title to registered land cannot be placed in the name of a beneficiary during that six month period without consent of all interested parties or an order of the court. Notwithstanding that land is conveyed to a beneficiary during the six month period, it is still subject to being charged by the order.

The Act does not forbid the distribution of the estate after six months, even where an application is pending. However, under section 9 the portion of the estate so distributed "shall be held subject to the provisions of the order" made pursuant to an application commenced within the six months.

3. Notice of Application for Probate

Section 135 of the *Estate Administration Act* requires an applicant for a grant of letters probate to deliver notice of the application to any person entitled to apply under the *Wills Variation Act*, or, where appropriate, to his parent or guardian, and the Public Trustee as well as a committee, if there is one. Service upon potential applicants under the *Estate Administration Act* is required in order to give them adequate notice so that they may commence an application under the Act in time, as well as to alert a potential applicant of his entitlement, if any, under the will.[193] A grant of letters probate will not necessarily be set aside if it is issued out of a registry not specified in the notice.[194]

4. The Application

Under the 1961 Rules of Court, proceedings under the Act were commenced by petition.[195] Respondents were not required to file pleadings unless so ordered by a judge.[196] Discovery could be had only by a court order.[197] Neither rule was particularly conducive to an orderly resolution of disputes.

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[189] Section 10 (b).

[190] Section 10 (c).

[191] *Re Hendrikson Estate*, (1966) 58 W.W.R. 437 (B.C.S.C.).

[192] *Gilles* v. *Althouse*, *supra*, n. 186; *Re Dentinger*, *supra*, n. 186.

[193] *See Re Herron*, (1941) 56 B.C.R. 465, [1941] 4 D.L.R. 203, [1941] 3 W.W.R. 877 (B.C.C.A.), *aff'g.* (1941) 56 B.C.R. 178, [1941] 2 D.L.R. 71, [1941] 1 W.W.R. 356.

[194] *Hayes* v. *Montreal Trust Co. et al*, (1977) 3 B.C.L.R. 42 (B.C.S.C. in Probate).

[195] Order LIVa (M.R. 777 *et seq.*).

[196] *Re Hume*, (1968) 65 W.W.R. 766 (B.C.S.C.); M.R. 777d.

[197] *Re Hitchen*, (1943) 60 B.C.R. 117, [1944] 1 W.W.R. 245; *Re Worts*, (1977) 3 B.C.L.R. 55 (B.C.S.C.).

Under the 1977 Supreme Court Rules a proceeding under the Act is to be commenced by writ of summons.[198] In respect of discovery procedures and pleadings, the action proceeds like any civil cause.

In some respects a *Wills Variation Act* action is different from other civil causes. Judgment in default of appearance or defence cannot be obtained, although Rule 25 (1) (default in delivery of statement of claim) is framed widely enough to encompass the dismissal of a *Wills Variation Act* application for failure to deliver a statement of claim. Nor is it likely that a summary judgment could be obtained under Rule 18. An application under the Act is for a discretionary order, not for a judgment on a set of facts. An applicant could not swear that there are no facts upon which a judge could refuse to exercise his discretion. There would be no objection, however, to striking out a writ if it disclosed no right to claim relief. For example, an application brought by the brother of a testator would disclose no cause of action under the current Act.

Unlike other civil causes, it may be impossible to settle the action by way of a consent order. Dependant's relief legislation should not be applied to alter the will of a deceased person without a hearing and without a judge being satisfied that the deceased failed to observe his moral obligation to provide for the applicant.[199]

Evidence should probably be led in every application, even if only to support a settlement agreed upon by all the parties. The evidence should establish that the testator breached his duty to make adequate provision, or else the application will fail. In *Pulham* v. *Yorkshire Trust Co.*,[200] all parties consented to a variation of the testator's will in favour of the surviving spouse. Taylor J. held that the deceased had not breached his duty to make adequate provision and, therefore, the court had no jurisdiction to make an order whether it was consented to by all parties or not.

Section 8 (1) provides that an action by one person may be treated by the court as an application by all persons who have the right to apply. In practice, however, it is wise to issue a separate writ on behalf of applicants who are deemed parties to the action, because it is uncertain what effect a discontinuance of the action with respect to the original applicant will have on the action of one who is deemed to be a party to the original action.

To ensure that land affected by an action under the Act is not encumbered or conveyed before an order is made, a *lis pendens* must be registered under the *Land Title Act* within 10 days of the issuance of the writ of summons. Similarly, where an order is made affecting land, it is ineffective to bind the land unless duly registered in the appropriate land title office.

5. Costs

Like any action instituted by writ, the award of costs of an application is a matter for the discretion of the court. Each case is considered on its merits.[201] The usual rule is that costs follow the event. Normally the unsuccessful applicant will be required to pay costs and the successful applicant will be awarded costs from the estate.[202] In *Lukie* v. *Helgason* Robertson J.A. said:[203]

> As to costs, I can see no "good cause" under s. 30 of The Court of Appeal Act, R.S.B.C. 1960, c. 82, for ordering that the costs of the appeal shall not

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[198] Rule 8(13).

[199] *Re Thompson Estate*, (1957) 21 W.W.R. 624 (B.C.S.C.).

[200] (1980) 16 B.C.L.R. 80 (B.C.S.C.); *cf. Re Barker*, (1982) 39 O.R. (2d) 643 (Ont. H.C.).

[201] *Re Day*, (1952) 4 W.W.R. (N.S.) 644 (Sask. Q.B.); *Re Dewar*, (1952) 6 W.W.R. 608 (B.C.S.C.).

[202] *Re Bowe*, [1971] 4 W.W.R. 234, 19 D.L.R. (3d) 388 (B.C.S.C.).

[203] (1977) 1 B.C.L.R. 1, 14-15, [1976] 6 W.W.R. 395, 26 R.F.L. 164, 72 D.L.R. (3d) 395, 407 (B.C.C.A.).

> follow the event, and so I would order that the appellants recover their costs from the respondents as between party and party. Nor do I see why the costs below should not be disposed of in the same way: see O. LXV, R. 1. I look without favour on any idea that persons without meritorious claims under the Act to share in the estate of a testator may have a try at getting part of his estate without risk to themselves and at the expense of the persons whom the testator wished to benefit.

Good reason must be shown for departing from the general rule. In *Re Edgelow*[204] the applicant was excused from paying costs of an unsuccessful application because of her poverty. Each party paid its own costs. In *Re Tero (No. 2)*[205] the application was dismissed, but the applicant was awarded costs to be paid out of the estate. The applicant claimed to be the widow of the deceased. The deceased had "married" three "wives" without obtaining a valid divorce from his first wife. The applicant had signed a separation agreement with the deceased which provided for maintenance payments, none of which were made. In these circumstances the court felt that the testator's estate should pay the costs of litigation. In *Re Wildeman and Co-op Trust Co. of Canada*,[206] the surviving spouse died before disposition of the application. The court awarded the applicant's estate costs of the application. It was said that the surviving spouse is generally entitled to a full review by the court of the circumstances and, therefore, is often awarded costs even if the application is unsuccessful.

A question which follows from whether costs are payable from the estate is the choice of scale upon which they should be calculated. For example, costs can be awarded on a party and party, solicitor and client, or solicitor and own client scale. The first two scales of costs are provided by tariff in the Supreme Court rules. Party and party costs are set at a lower scale than solicitor and client costs. Solicitor and own client costs are calculated as the actual fees payable by the client to his solicitor. That measure of costs is awarded when the parties have by prior contract agreed to that scale. Solicitor and client costs are awarded when the unsuccessful party has conducted himself in a manner which deserves the sanction of increased costs. Solicitor and client costs serve as a kind of punishment to the unsuccessful litigant whose unnecessary and unwarranted conduct has increased the successful litigant's costs.

The court has a wide discretion when awarding costs. In many cases, even if unsuccessful, a litigant will be entitled to costs out of the estate, usually on a party and party scale. A litigant who has been obliged to defend the claim, and is successful, may be entitled to costs on the higher solicitor and client scale. In a recent case, *LeComte* v. *LeComte*,[207] which concerned allegations of undue influence rather than wills variation, the unsuccessful litigant alleged that the testator had been coerced into making his will. He was awarded costs on a party and party basis, payable out of the estate. The beneficiaries of the will who successfully defended the action were entitled to costs on a solicitor and client scale.

6. Appeals

Section 15 of the Act provides:

> **Appeal to the Court of Appeal**
> A person who considers himself prejudicially affected by an order of the court may appeal to the Court of Appeal.

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[204] (1955) 18 W.W.R. 235, 1 D.L.R. (2d) 126 (B.C.C.A.).

[205] [1949] 2 W.W.R. 127 (B.C.S.C.).

[206] (1973) 39 D.L.R. (3d) 767 (Sask. Q.B.).

[207] [1982] B.C.D. Civ. 4219-01 (B.C.S.C.); *see also Re Dentinger*, *supra*, n. 186; *Re Babcock*, (1982) 17 A.C.W.S. (2d) 83 (N.S. Prob. Ct.).

Appeal from an order under the *Wills Variation Act* is in the same form as from a judgment in any civil cause, but the appeal court exercises a wider discretion to vary the trial judge's decision under a *Wills Variation Act* application.[208]

In *Re Blackwell*[209] it was held that the appeal court should interfere with the trial judge's discretion only where he had taken into consideration matters that should not be considered, or had taken an improper view of the purpose, scope or application of the Act, or otherwise was plainly wrong. However, the weight of case authority supports the proposition that it is not only the right but the duty of the appeal court to consider the undisputed facts of the case and come to its own conclusions as to what is just and equitable in all the circumstances.[210] In *Re Woods*, Martland J. said:[211]

> In my opinion, in view of the special nature of the provisions of the Act in question and the specific right of appeal which it confers, it is not proper to impose any fetters on the powers of the Court of Appeal in considering appeals under this Act. The entire jurisdiction of the trial judge under this statute is discretionary in character. The relief which may be granted under it is completely dependant on his opinion, first, as to whether adequate provision for proper maintenance and support has been provided for the spouse and children under the will, and second, if adequate provision is not thought to be made, as to what provision should be made. Notwithstanding this, the Act, by section 17, gives to any party deeming himself to be prejudicially affected, a right to appeal. I construe section 17 as meaning that any person who considers himself prejudicially affected by the discretion exercised by the trial judge has a right to appeal, and, in consequence, the Act must contemplate a review of that discretion by the Court of Appeal. This being so, that court has the power and the duty to review the circumstances and reach its own conclusion as to the discretion properly to be exercised.

It was also argued in *Re Woods* that the discretion the judge exercises is "equitable" and therefore, the proceeding is in equity, such as would give rise to an appeal to the Supreme Court of Canada without leave. It was held that the discretion was statutory, and that the word equitable was used in the *Wills Variation Act* in a wider sense.

We mentioned suspensory orders earlier. A suspensory order is often signified by granting an order to an applicant reserving "liberty to apply." This means that the applicant may apply in the future as circumstances change. If a suspensory order is made, there may be no right to appeal because there is still "liberty to apply" for more or less.[212]

The Court of Appeal will not consider new evidence of changed circumstances on an appeal.[213]

G. Contracting Out/Waiver

A person entitled to apply for relief under the *Wills Variation Act* may not contract out of the benefit of the Act. The Act was passed not only in the interests of the potential applicant, but also in the interests of third parties, including the Crown, who might become responsible for their mainte-

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[208] Before amendment by S.B.C. 1982, c. 7, s. 118, section 15 read as follows:

> **15.** From any order made under this Act a party deeming himself prejudicially affected may appeal to the Court of Appeal within the same time and in the same manner as from a final judgment of the court in a civil cause.

[209] [1948] O.R. 522, [1948] 3 D.L.R. 621 (Ont. C.A.).

[210] *Pope* v. *Stevens*, (1955) 14 W.W.R. 71, 63 Man. R. 162, [1955] 2 D.L.R. 193 (C.A.); *Re Kvasnak*, (1951) 2 W.W.R. (N.S.) 174, [1951] 3 D.L.R. 412 (Sask. C.A.); *Re Randle*, [1976] 6 W.W.R. 230, 71 D.L.R. (3d) 208 (Alta. C.A.); *Re Sloane and Bartley*, (1980) 119 D.L.R. (3d) 611 (Man. C.A.).

[211] (1966), 59 D.L.R. (2d) 357 at 361, 58 W.W.R. 232 (S.C.C.).

[212] *Re Savannah*, (1963) 43 W.W.R. 569 (B.C.S.C.).

[213] *Morris* v. *Morris*, [1982] B.C.D. Civ. 4223-13 (B.C.C.A.).

nance.[214] The court retains jurisdiction to make an award notwithstanding that the agreement was executed prior to marriage,[215] upon separation,[216] or after the testator's death.[217] Nor is it significant that the applicant has received valuable consideration for the waiver. The consideration received by the applicant under a contract waiving rights pursuant to the *Wills Variation Act* will be taken into account in determining what would be adequate provision for the applicant.[218] In *Re Lewis*,[219] property was settled on the applicant wife, which she agreed to regard as sufficient maintenance after the testator's death. In *Re Close*,[220] the wife, in exchange for cash, agreed that the testator's will should remain in full force and effect. In neither case were the agreements sufficient to oust the court's jurisdiction to determine whether adequate provision had been made for the wife.

The New Brunswick Act contains a section that recognizes contracts to leave by will. In *Re Marquis Estate*,[221] the testator and the applicant widow each agreed not to make any claims on the other's estate in order that their respective estates might go to the children of former marriages. The court examined the provisions of the will executed by the testator, and felt that he had provided adequately for his wife. It is implicit in this decision that the deceased's agreement with his wife to leave his estate to his children fell within that section of the New Brunswick Act that recognizes contracts to leave by will.

In other jurisdictions applicants are expressly permitted to waive rights under the Act. In England, an agreement to waive rights under the Act must be approved by the court to be effective. Professor Martyn, commenting on section 15 of the English *Inheritance (Provision for Family and Dependents) Act 1975* makes the following observations:[222]

> This provides a means whereby property arrangements on the break up of a marriage can be given the advantage of finality. Secondly, on an application under the Act by a person entitled to payments from the deceased under a secured periodic payments order made under the *Matrimonial Causes Act 1975*, the court is given power to vary or discharge that order. Thirdly the court has a similar power to vary or revoke a maintenance agreement, on an application under the Act by a person entitled to payments under such an agreement. Fourthly the reverse applies where an application is made . . . for the variation or discharge of a secured periodical payments order after the death of the payor or . . . for the alteration of a maintenance agreement, the court has power, in effect to treat the application as an application under the Act and exercise its powers thereunder. This does not apply, however, if future applications under the Act have been barred by an order under section 15 of the Act . . .

H. Aliens

Courts are sometimes reluctant to make awards in favour of foreign applicants. In *Re Lukac*,[223] Milvain J. made an award in favour of an alien

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[214] *Cooperman* v. *Cooperman*, [1978] 5 W.W.R. 518, 3 E.T.R. 39 (B.C.S.C.); *Re Lewis*, (1935) 49 B.C.R. 386, [1935] 2 D.L.R. 45, [1935] 1 W.W.R. 747 (B.C.C.A.); *Jones* v. *Kline and Hoe*, [1938] 3 W.W.R. 65, [1938] 4 D.L.R. 391 (Alta. S.C.).

[215] *Re Berube*, [1973] 3 W.W.R. 180, 12 R.F.L., 34 D.L.R (3d) 445 (Alta. C.A.); *Collard* v. *Collard*, (1977) 28 R.F.L. 252 (Sask. Surr. Ct.); *Re Duranceau*, [1952] O.R. 584, [1952] 3 D.L.R. 714 (C.A.).

[216] *Cooperman*, *supra* n. 214; *Jones*, *supra*, n. 214; *Re Edwards*, (1961) 36 W.W.R. 605, 31 D.L.R. (2d) 368 (Alta. C.A.); *Re McNamara*, (1943) 59 B.C.R. 70, [1943] 3 D.L.R. 396, [1943] 2 W.W.R. 344 (B.C.C.A.); *Re Foxe*, (1944) 60 B.C.R. 77, [1944] 2 D.L.R. 392 (B.C.S.C.).

[217] *Re Stannard*, (1960) 32 W.W.R. 432 (B.C.S.C.).

[218] *Re Lewis*, *supra*, n. 214; *Re Hawley*, (1962) 38 W.W.R. 354 (Sask. Q.B.); *Re McNamara*, *ibid*. *Re Casselman*, (1974) 4 O.R. (2d) 166, 47 D.L.R. (3d) 354 (H.C.); *Menrad* v. *Blowers*, (1982) 28 R.F.L. (2d) 289 (Man. Q.B.).

[219] *Supra*, n. 214.

[220] [1952] O.W.N. 660, [1952] 3 D.L.R. 814 (C.A.).

[221] [1980] 30 N.B.R. (2d) 93 (Q.B.).

[222] *Supra*, n. 179.

[223] [1965] 1 O.R. 575, 49 D.L.R. (2d) 52, *aff'g*. [1963] 2 O.R. 209, 39 D.L.R. (2d) 6 (C.A.).

applicant. In *Zajac* v. *Zwarycz*,[224] the testator emigrated from Russia to Canada but left his wife behind in Russia. Upon his death, his wife applied for relief under the Act. Her application was refused. Even if the testator had failed to provide adequate maintenance for his wife and the court had jurisdiction to vary his will, it was likely that any order made would only enrich the treasury of a foreign government rather than benefit the applicant. The making of such an order would defeat the purpose of the Act. In *Re Soroka*[225] the Ontario High Court came to a different conclusion. The testator had married in Poland and lived with his wife for a few months before emigrating to Canada. They had been separated for 42 years. The court held that the widow was entitled to relief. Generally, because the applicant is a spouse or child of the deceased, it is not significant that the applicant resides outside of the jurisdiction or is of another nationality.[226]

I. Reform

Dependant's relief legislation has been the subject of extensive study in other jurisdictions. Among law reform bodies who have reported on this topic are the Alberta Institute of Law Research and Reform,[227] the Ontario Law Reform Commission,[228] the Law Commission (England),[229] the Law Reform Committee of Western Australia,[230] the Law Reform Commission of New South Wales,[231] and the Queensland Law Reform Commission.[232]

We mentioned alternative courses to wills variation legislation. These alternative courses are really all variations of a system which provides the surviving spouse with a fixed portion of the deceased spouse's estate. In the United States, for example, many of the states have enacted legislation based upon the *Uniform Probate Code* which gives the surviving spouse an elective share of one-third of the deceased spouse's estate.[233] Dependant's relief legislation is the creation of certain Commonwealth countries. Jurisdictions outside of the Commonwealth tend to view it with disfavour. One American commentator has made the following observations respecting dependant's relief legislation:[234]

> The Commonwealth scheme has had its serious proponents for adoption in this country, but the British version was rejected by New York. Although conceding that the system, which provides for a court-ordered readjustment of the estate after death, has worked well in the countries which have adopted it, the Temporary Commission on Estates advanced the following reasons for its rejection:
>
> > Such legislation would require that the share of the surviving spouse, if any, would be determined by the judge to whom the application was made. That this would promote litigation in most estates of married decedents, where the surviving spouse has not received the entire assets of the decedent or has not acquiesced in the provisions made by the decedent is evident. Aside from the burden that this would place upon the courts, the

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[224] (1975) 10 O.R. (2d) 638, 64 D.L.R. (3d) 234, 25 R.F.L. 169 (H.C.). *See* Bill 210, 4th Session, 31st Legislature, Ontario, 29 Eliz. II, 1980, *An Act to Amend the Devolution of Estates Act, and see* Bill 225, 4th session, 31st Legislature, Ontario, 29 Eliz. II, 1980, *An Act Respecting the Succession to Estates of Deceased Persons in Ontario Who Have Beneficiaries Residing in Designated Countries*, (Bill 174, First Session, 32nd Legislatur, Ontario, 30 Eliz. II, 1981).

[225] (1963) 40 D.L.R. (2d) 120, 44 W.W.R. 582 (Alta. S.C.).

[226] *Re Lukac*, *ibid*. *Re Kwasnak Estate*, *supra*, n. 210; *Re Parkanski*, (1966) 56 D.L.R. (2d) 475 (Sask. Q.B.); *Re C. Zajkowski*, [1963] 2 O.R. 513, 40 D.L.R. (2d) 270 (C.A.).

[227] Report No. 29, *Family Relief* (1978).

[228] *Report on Family Law*: "Part IV, Family Property Law" (1974).

[229] Report No. (. . ., *Family Provision on Death*, (1974).

[230] *Report on the Protection to be Given to the Family and Dependants of a Deceased Person*, (1970).

[231] Report No. 28, *Testator's Family Maintenance and Guardianship of Infants Act, 1916*, (1977).

[232] Report No. 22, *On the Law Relating to Succession*.

[233] Section 2 - 201

[234] *Supra*, n. 5 at 227-8.

> wisdom of allowing the courts to dispose of the decedent's assets as the particular judge deems just, rather than allowing the decedent to dispose of his property as he sees fit, is open to serious objections. We believe that our tradition of limited restraint upon the disposition of property by will has become part of our public policy. Of course, the law should prevent a person from pauperizing his dependents but it is submitted that at least insofar as the faithful surviving spouse is concerned, a minimal statutory share will not only adequately protect him or her, but will avoid the expense and inconvenience of court proceedings to obtain maintenance from an estate which he or she probably had a hand in accumulating.

Other objections to the British system were its inconsistency with estate planning and the uncertainty a property-owner would face concerning the ultimate distribution of his property; its built-in invitation to litigation; and its unsuitability to a very large population. Most relevant to the present investigation, however, is the following statement:

> Perhaps maintenance legislation is in order for what is the rare case where a person disinherits his minor or dependent children as well as their surviving parent . . . . The surviving spouse should be treated differently, however, since his or her claim is not based solely on dependency (certainly it is not insofar as the husband is concerned) but also in recognition of the partnership created by the marriage.

This concept of "recognition of the partnership created by the marriage" is what community property is all about.

The chief criticism of dependant's relief legislation rests on the fact that it is discretionary, involving court application. The discretionary nature of the relief is also its strongest and most appealing feature, since it permits the greatest flexibility in handling these matters on a case by case basis.

The concluding reference in the quotation is of particular significance. It suggests that the surviving spouse's entitlement is based in part in recognition of the partnership created by the marriage. It is true that the partnership aspect of marriage is fundamental to community property regimes. In British Columbia, under the *Family Relations Act*, matrimonial property is not community property. Each spouse is entitled to his or her own separate property. In the event of marital break-up, a kind of community property arises. This system will be described more fully later. It is a deferred discretionary system of community property and represents a compromise between separate property and full community of property. British Columbia courts have consistently rejected the proposition that the *Family Relations Act* creates a partnership between spouses arising upon their marriage.

Dependant's relief legislation, as we have mentioned, gives the courts a great deal of flexibility in handling cases which tend to be unique. It also permits the courts to consider the interests of dependants of the deceased other than the surviving spouse. In our opinion these are compelling reasons to retain dependant's relief legislation and not to tinker with its basic structure. The New South Wales Law Reform Commission, in its Working Paper on *The Family Maintenance and Guardianship of Infants Act, 1916*, specifically requested comment on whether consideration should be given to entitlement to a fixed portion of the estate, rather than dependant's relief legislation. They said in their report:[235]

> [We hoped to] evoke public debate about the principles on which our laws of succession ought to be based. The hope was not fulfilled and we think that the time for proposing fundamental changes in those laws has not yet come. For this reason, the bill seeks only to extend existing principles, not to supplant them. We are supported in this approach by the fact that no person has said to us that the policy of the Act is wrong.

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[235] No. 28 at 8-9

In the preceding discussion we have noted a number of aspects of the law which require change or clarification.

1. Nature of the Court's Discretion

We mentioned earlier that in British Columbia the courts waver between applying tests of need and of moral obligation, and make awards that appear to vary between protecting dependants from destitution to equitably reapportioning the testator's estate. Some commentators have argued that this sort of inconsistency denotes a significant flaw in dependant's relief legislation, and creates a legal situation which is both uncertain and unpredictable. There is support for the proposition that relief under the Act should only be granted to applicants in need.

One member of the Commission is firmly of the view that, in adopting the testator's "moral obligation" as a touchstone for the exercise of discretion under the Act, the courts have erred. He suggests that the way in which the discretion is presently exercised represents an unwarranted intrusion into freedom of testation and has led to a degree of uncertainty in the planning and administration of estates that cannot be justified. His views are set out in the reservation following Chapter V.

A majority of the Commission believes that the courts should retain their broad discretion to vary a testator's will. The principle of freedom of testation is secondary to the enforcement of a testator's moral obligation to provide adequately for his family. Under the current law, need is not a precondition for a successful application under the *Wills Variation Act*. It is only one factor considered by the courts when exercising their broad discretion to consider the terms of a will in the context of prevailing circumstances. That approach is desirable if the courts are to be able to ensure that a deceased observes his moral obligations to his family.

A deceased's moral obligations to provide adequately for his family differ from *inter vivos* obligations he may have owed them. Principles which determine *inter vivos* obligations are primarily founded upon concepts of maintenance and support. In some cases members of the deceased's family have a moral claim to share in the assets of his estate which is not necessarily limited to support. The basis of this conclusion is that a deceased's death significantly alters his obligations to his family and dependants, in part because the deceased no longer requires his estate. *Inter vivos* obligations depend upon a weighing of the needs of both parties. Obligations arising after the deceased's demise should be determined with reference to the fact that the deceased no longer has any needs. Moral obligations arising after the deceased's death are determined by weighing freedom of testation against his family's claims. The balance in that case often weighs in favour of his family's claims. That position has been recently confirmed by the British Columbia Court of Appeal in *Bates* v. *Bates* and Froom,[236] where it was observed:

> [W]hat a spouse's duty is during that spouse's lifetime may be quite different than the duty upon death.

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[236] (1982) 11 E.T.R. 310 at 315 (B.C.C.A.); *Richards* v. *Person* (1983) 20 A.C.W.S. (2d) 315 (B.C.C.A.); *see also Re Mannion* (1982) 31 R.F.L. (2d) 133, (Ont. Div. Ct.) and *Shaw* v. *Shaw* [1954] 2 Q.B. 429 (C.A.), where the plaintiff went through a form of marriage with S which was void because S was already a married man. They lived together as man and wife for 15 years until S's death, at which time the plaintiff became aware she was not legally married to S. She sued the estate for S's breach of promise to marry and her damages were assessed at the intestate share she would have been entitled to had they been married, despite the fact that, had the action been brought against S during his lifetime, her damages would have been nominal.

Whether the courts should make an order, and how large a share of the estate an applicant should be entitled to, is a function of many factors, including the applicant's relationship with the deceased, the applicant's conduct, his situtation in life, and the size of the testator's estate. The importance of these factors shifts depending on the circumstances of the case. It is impossible to characterize a neat and simple test that will apply in all possible circumstances. A minor child who is destitute may be entitled to a share in the estate. An adult child, who is similarly impoverished, may not be entitled to a share in the estate, or he may be entitled to a smaller share than that received by the minor child. The "need" is the same in each case. It is the testator's moral obligation that varies. While not definitive, the term "moral obligation" is descriptive. For over 60 years the courts have used this discretion wisely, so that, on a case-by-case basis, justice, more often than not, is done.

In addition to the problems posed by the testator who ignores his obligations to his family, there are those which arise when a testator is influenced by others to make a will which does not record his actual intentions. The law requires the one who propounds a will for probate to prove that the testator knew and approved its contents.[237] Probate will be refused if it can be proved that undue influence was exerted on the testator to make certain testamentary provisions. Undue influence consists of unreasonable persuasion from overbearing or unconscionable behaviour or quiet insinuation which amounts to coercion. The abuse of faith or trust by one who stood in a fiduciary or confidential relationship to the testator is characterized as "suspicious circumstances" and the courts may, without other evidence of undue influence, consider whether the terms of the will are reasonable.[238]

Notwithstanding the existence of safeguards, such as undue influence, it must be recognized that the law is not always adequate to ensure that the testator's will represented his wishes. Undue influence is difficult to prove, if only because the pressure exerted upon the testator is often known only to him, and to the one who benefits from it. In many cases the only evidence to suggest undue influence, or fraud or duress, is the will itself.

When, therefore, a testator by will prefers one or more members of his family over others equally deserving, the courts should be permitted to inquire into the circumstances surrounding the making of the will in order to determine the testator's motivations. One function served by the *Wills Variation Act*, therefore, is to guard the testator from being victimized by grasping relatives and others. This is a function the *Wills Variation Act* could not serve if an applicant's success was based upon need. It is important, therefore, for the courts' discretion under the *Wills Variation Act* to remain as broad as possible.

It should also be remembered that a precondition to testamentary capacity is the ability to consider the claims of those who are related to the testator and who, according to the ordinary feelings of mankind, are supposed to have some claim to his consideration when determining the disposition of his property after his death. Testamentary incapacity cannot be established by reference to the terms of the will itself. It is not enough that the terms of the will are irrational. Additional evidence respecting the testator's state of mind when he made the will must be adduced. In many cases notwithstanding the testator's inability to consider those moral claims, that evidence will not be

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[237] *See* generally Feeney, *The Law of Wills in Canada — Probate* (1976), Chapter 3. *LeComte v. LeComte*, (unreported B.C.S.C. decision), [1982] B.C.D. Civ. 4219-01. *Cuthbert v. Price*, (Unreported B.C.S.C. decision) (1982) 13 A.C.W.S. (2d) 501, [1982] B.C.D. Civ. 4219-02.

[238] *See, e.g., Slater v. Chitrenky*, [1982] 3 W.W.R. 575 (Alta. C.A.).

available. The courts should be permitted to consider the testator's will in the context of the circumstances in which it was made. If the will is irrational in the sense that it offends "the ordinary feelings of mankind" with respect to his treatment of family members who had some claim to his consideration, the court should have power to correct it.[239] An unfair distribution may also result from the testator's failure to take into account changed circumstances occurring between the making of the will and the testator's death.[240] Again, the courts could not consider these matters if an applicant's success depended upon his need.[241]

One proposition fundamental to the *Family Relations Act* is that in some cases what appears to be the property of one spouse may be regarded as the property of the other. The *Family Relations Act* probably does not apply after the death of one spouse. The *Wills Variation Act* provides a valuable back-up to that legislation by protecting the surviving spouse and his or her interest in property which is nominally in the name of the deceased, but which the law might regard, had both spouses been alive, as the property of the surviving spouse. Similarly, other members of the deceased's family, by reason of their efforts or contributions, may have a moral claim to share in the deceased's estate, quite apart from any need for maintenance and support. In part, therefore, a broad discretion under the *Wills Variation Act* is essential to protect the integrity of the family unit by ensuring that what is really family property is not disposed of to strangers.

The Commission is aware that *Wills Variation Act* applications are responsible for a great deal of litigation. The functions served by the *Wills Variation Act* are sufficiently important that the risk of litigation, the majority has concluded, is one that must be accepted. It should be recognized, however, that even if the courts were not able to exercise a broad discretion under the *Wills Variation Act*, litigation would not necessarily decrease. Instead of being able to address directly the issue of whether the will made adequate provision for the deceased's family, wills would be challenged on the grounds of undue influence, suspicious circumstances, or the testator's mental incompetence. These are some of the grounds for contesting the validity of a will. The result of successful challenges in those cases is that the will fails and the testator's property passes on an intestacy, which may or may not be satisfactory in the circumstances. An unfair, though valid, will may encourage similar, unsuccessful challenges. It is desirable for the courts to consider the principal issue, whether adequate provision has been made for the deceased's family, rather than an indirect attack on the validity of the will which is motivated by that reason. And it is desirable that the courts, in such cases, be able to determine what constitutes adequate provision rather than merely let the will fail. For these reasons, as well as the conclusion that death significantly alters the deceased's obligations to his family and dependants, the majority has concluded that the nature of the court's discretion to provide relief should not be changed.

In the Working Paper, we proposed that the basis of the court's jurisdiction to make an order under the *Wills Variation Act* should not be changed. We received a number of submissions which disapproved of the proposal. Some felt that an order should only be made in favour of an applicant who is in need. Others suggested that only persons maintained by, or otherwise dependent on,

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[239] *See, e.g., Ritchie v. Erickson*, (1982) 15 A.C.W.S. (2d) 157 (B.C.S.C.).

[240] *Harris v. Hards*, (Unreported B.C.S.C. decision) Van. Reg. No. C804612, Jan. 28, 1982, *per* Meredith J. B.C.D. Civ. [1982] 4223-08.

[241] *Valensch v. Valensch*, (Unreported B.C.S.C. decision) Vernon Reg. No. 808503, March 9, 1982, *per* Dohm J. B.C.D. Civ. [1982] 4223-08.

the deceased during his or her lifetime should be permitted to apply. One correspondent suggested that the *Wills Variation Act* be repealed and a fixed share scheme adopted in its place. Under that approach, a portion of the deceased's estate would devolve upon his family by operation of law.

Although our correspondents suggested a variety of approaches, they appeared to share two concerns. First, they were concerned that the current Act provides little certainty to whether an application will be successful, and what portion an applicant may be entitled to. Second, they were concerned that the current Act is being abused. Many unmeritorious applications are being brought. Rather than incur the expense of a trial, settlements of these nuisance claims are often made.

These are matters of concern, and have been carefully considered by the Commission. Narrowing the jurisdiction of the courts under the Act, however, is undesirable. Fettering the jurisdiction of the courts to prevent claims without merit would also tie their hands in cases where intervention is important. In any event, the courts have the means to discourage nuisance claims, through the award of costs. It would appear, however, that seldom is an award of costs made against an unsuccessful applicant. Moreover, the language of the current Act is open to a more narrow interpretation than that which is being made. The broad jurisdiction enjoyed by the courts is largely of their own making. Those two factors suggest that judges find a broad jurisdiction useful to avoid injustice.

For these reasons, a majority of the Commission has concluded that the court's jurisdiction under the *Wills Variation Act* should not be confined. The courts will distinguish between various applicants on the basis of the degree of relationship and the circumstances. Any other approach risks the inability to provide a remedy where it is necessary.

The Commission recommends:

9. That the basis of the courts' jurisdiction to make an order under the Wills Variation Act *should not be changed.*

2. Eligibility to Apply

Currently only the testator's spouse and children may apply under the *Wills Variation Act*. However, in many cases the testator may owe moral obligations to others not included in this restricted class.

(a) Common Law Spouses

A common law spouse of a stable relationship not sanctioned by marriage, in many cases, may be as deserving of a share in a deceased's estate as a lawfully married spouse. The court should have discretion to determine an adequate award for a common law spouse, based upon the circumstances of the case, not necessarily confined to need. A relationship of short duration will probably not entitle a surviving common law spouse to a substantial portion of the estate.[242] An enduring relationship will probably entitle the surviving common law spouse to be treated as if the relationship with the deceased had been a lawful marriage.[243]

Our concern is to ensure that persons who may require financial provision, which ought to have been provided by the deceased, are permitted to apply to the courts. Eligibility to apply is quite a different matter from

[242] *See, e.g., Re Geiger* (1982) 11 E.T.R. 152 (Ont. Surr. Ct.); *cf. Howard v. Coughlin* [1983] B.C.D. Civ. 4223-10 (B.C.S.C.).

[243] *See, e.g., Brandkamp v. Bindels* (1983) 20 A.C.W.S. (2d) 137 (Man. Q.B.); *Re Nelson* (1982) 28 R.F.L. (2d) 323 (B.C.S.C.).

entitlement to a share in an estate. It is a much more difficult question to determine what an eligible applicant should be entitled to receive. Entitlement depends upon innumerable factors, which will vary considerably from case to case. These factors should be weighed by the courts, and it is necessary to rely upon their discretion to make an appropriate award.

The New South Wales Law Reform Commission recommended that a surviving spouse of a *de facto* marriage should be eligible to apply. They said:[244]

> **2.6.12 De facto marriages generally.** It can be argued, in a wider context, that we should be considering how the law can best be used to help marriage, not how the law can encourage alternatives. But we cannot ignore the fact that men and women do live together in extra-marital unions. If injustice (in the sense of avoidable hurt) may flow from the new Act not acknowledging that fact, we think it better for the community to remove the cause of the injustice (and in so doing perhaps offend some of its members) than to permit the injustice to continue. And we do not think it right that the Court can overturn the testamentary provisions of a married person but not those of a person who declines to marry but nonetheless assumes marriage-like obligations. Under the present law, a person determined to preserve his testamentary freedom is better placed to succeed if he does not marry. Public policy should not countenance this situation when public policy, through the Act, recognizes that not all testators are wise and just.

The argument that permitting a surviving common law spouse to apply will only encourage common law relationships is met by the argument that failing to allow a surviving common law spouse to apply permits the deceased common law spouse to avoid his moral obligations. Prohibiting common law spouses from applying under the *Wills Variation Act* may tend to encourage common law relationships since a person can have all the advantages of a marriage and pretend to assume obligations safe in the knowledge that the law will not enforce them. Failing to recognize alternative relationships to marriage does not necessarily discourage people from entering into one. It may actually encourage them to do so.[245]

In the Fifth Report of the British Columbia Royal Commission on Family and Children's Law, it was recommended:[246]

> The *[Wills Variation] Act* should be amended to permit claims by a man, woman or child where they have been living together and have been maintained by the testator for a period of one year immediately preceding the making of the testator's will.

We agree in principle with this recommendation, although we do not think that when the testator makes his will is determinative of his moral obligation to provide for his common law spouse or illegitimate children.

The *Family Relations Act* requires common law spouses to recognize various obligations during their joint lifetimes. Whether enforcing obligations like maintenance or support between common law spouses encourages or sanctions alternative relationships to marriage is insignificant. The law recognizes that one or the other common law spouse, upon the dissolution of their relationship, may require financial assistance just as might either a husband or wife, upon the dissolution of their marriage. Merely because a common law relationship is ended by the death of one of the parties to it does not alter that

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[244] *Supra*, n. 231, at 23; *see also* the recently circulated Issues Paper, prepared by the New South Wales Law Reform Commission, entitled *De Facto Relationships* (1981).

[245] Another problem which follows from a failure to equate the status of a common law spouse with that of a lawfully married spouse is that sometimes the common law relationship is preferred over the marriage. *In Public Trustee for Alberta v. Lermen*, (1981) 16 Alta. L. R. (2d) 254 (Alta. C. A.), the deceased died in a car accident. He had separated from his lawful wife and did not support his children from that marriage. Insurance proceeds were payable to children of the household of which the deceased was the head. Insurance proceeds were paid to his two children of a common law relationship to the exclusion of his children from his lawful marriage.

[246] (B.C., March, 1975) recommendation 24.

possibility. Such obligations should be enforceable after the death of a common law spouse against that spouse's estate. Otherwise that burden falls upon society.

In our earlier discussion of the *Estate Administration Act*, we recommended that the provisions relating to common law spouses and illegitimate children should be deleted from the *Estate Administration Act*. In our opinion, these discretionary matters should be governed by the *Wills Variation Act*. Common law spouses and illegitimate children should be entitled to apply under that Act for a share in the deceased's estate, whether he made a will or died intestate.

We are concerned, however, that some effort should be made to define the kinds of alternative relationships to marriage from which should arise obligations enforceable against the estate of a deceased common law spouse.

The *Estate Administration Act* provides the following definition of a common law spouse to determine when he or she may be entitled to share in the estate of the deceased:[247]

> "Common law spouse" means either a person who is united to another person by a marriage that, although not a legal marriage, is valid by common law, or a person who has lived and cohabited with another person as a spouse and has been maintained by that other person for a period of not less than 2 years immediately preceding his death;

This definition meets our concern that the relationship with the deceased should be subsisting at the time of the deceased's death. Moreover, the two year requirement for cohabitation, by which it is determined whether the relationship was of a nature that mutual obligations between the common law spouses might have arisen, corresponds to the two years of cohabitation required under the *Family Relations Act*. We do not think, however, that whether one common law spouse has maintained another should be determinative. Earlier we concluded that the basis of the court's jurisdiction under the *Wills Variation Act* is not limited to providing for an applicant in need. Nor is it aimed at providing maintenance to an applicant. Moreover, that requirement may disentitle a surviving common law spouse from sharing in an estate to which he or she contributed, or was instrumental in creating through contributions to the deceased common law spouse's maintenance during his or her lifetime. We have concluded that a common law spouse who cohabited with the deceased for not less than two years immediately preceding the deceased's death, should be entitled to apply under the *Wills Variation Act* for a share in the deceased's estate. Where the common law relationship was subsisting at the time of the deceased's death, the question of maintenance should not determine eligibility to apply, although it may be significant in determining entitlement.

(b) Children Born out of Wedlock

An illegitimate child may claim in respect of his or her mother's but not the father's estate. Law reform bodies which have considered the status of illegitimacy have uniformly recommended that an illegitimate child should be able to claim in respect of his of her father's estate. The Royal Commission on Family and Children's Law has also made this recommendation.[248] We also agree that an illegitimate child should be able to claim in respect of his or her father's estate.

One further aspect should be clarified when legislation is enacted to permit an illegitimate child to apply against his father's estate under the *Wills*

[247] Section 85.

[248] *Supra*, n. 246.

Variation Act. Upon adoption, a legitimate child ceases to be the child of his natural parents. Similarly, it should be explicit in reform legislation that, upon adoption, an illegitimate child ceases to be the child of his natural parents. We discussed earlier that the policy decision to sever ties between a child and his natural parents upon adoption is one open to question. Nevertheless, our conclusion is that the rights of legitimate and illegitimate children should be identical. If, in the future, it is decided that succession rights between a child and his natural parents should not be severed, that decision should apply equally to legitimate and illegitimate children.

Beyond the problems of proving paternity, there is no good reason for prohibiting an illegitimate child from making a claim against his or her father's estate. Saskatchewan has enacted legislation which permits an illegitimate child to apply if paternity has been proved or acknowledged.[249] It also provides a presumption that support or maintenance of the child is an acknowledgment of paternity. The Saskatchewan legislation provides as follows

> **3.** (2) Where an application is made . . . by or on behalf of an illegitimate child an adjudication may be made on the hearing of the application that, for the purposes of this Act, the deceased was the father of the child, if the court is satisfied
> (a) that during his lifetime the deceased publicly or otherwise acknowledged that he was the father of the child; or
> (b) that at the time of the birth of the child the deceased was living with the mother of the child as her husband and that after the birth of the child the deceased seemed to have accepted the child as his own.

In British Columbia, paternity must be evidenced by court order or by registration under the British Columbia *Vital Statistics Act*. In our opinion these criteria are too limited. The presumption of paternity flowing from cohabitation and support should be satisfactory in most cases. However, we make no recommendations with respect to how paternity should be established. As we discussed in the previous chapter, this is an issue which arises in a great many aspects of the law other than succession, and should be considered separately from the subject of this Report.

Our conclusion that illegitimate children should be permitted to apply with respect to their natural parents' estates suggests that section 30 of the *Wills Act*, which deems an illegitimate child to be the legitimate child of his mother, should be amended to include the father as well.

(c) "Posthumous" Children

The Ontario *Succession Law Reform Act* provides that the definition of "child," "includes a child conceived before and born alive after the death of the parent."[250] A posthumous child would probably be able to maintain a claim against his or her parents' estates, but for greater certainty, the Act should contain a provision defining child to include posthumous children.

(d) Other Applicants

(i) Basis of Eligibility

In British Columbia, eligibility to apply for a greater share in the testator's estate was restricted to the testator's spouse and children because, in its inception, it was thought that dependant's relief legislation should serve only a very limited purpose, and intrude upon freedom of testation as little as possible. Recently many jurisdictions have enlarged the categories of those entitled to relief, recognizing that a testator may owe moral obligations to

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[249] *The Dependants' Relief Act*, R.S.S. 1978, D-25, *see also Cox v. Public Trustee* (1983) 19 A.C.W.S. 454 (N.S.S.C.); *Re McManus and Johnson* (1982) 15 A.C.W.S. (2d) 346 (N.S.S.C.).

[250] R.S.O. 1980, c. 488, s. 1 (1) (a).

people other than his spouse and children. For example, we have concluded that common law spouses, illegitimate children and posthumous children should be eligible to apply.

The formula by which eligibility should be determined presents a great many problems. In part, these problems flow from the difficulty of determining exactly what function the Act should serve.

Since the basis of the courts' discretion, in general terms, is to give effect to moral obligation, it would appear to follow that anyone for whom the testator morally ought to have made provision should be entitled to apply to the court for an order. Such an approach might be harmful to this process. Conceivably, dependant's relief legislation works well, notwithstanding that the basis upon which an award is made is flexible, because the parties entitled to apply are described specifically. In virtually every case the testator will have considered the interests of the surviving spouse and children, and the court can determine whether the provisions he had made are adequate. It is important that the testator know, when he makes his will, whose interests he should take into consideration. A vague definition of eligibility to apply would not permit that.

Several approaches have been either adopted or advocated in different jurisdictions. For example, all persons to whom the deceased owed legal support obligations during his lifetime might be entitled to apply. That approach has, in part, been adopted by the Alberta Institute of Law Research and Reform, which concluded that many legal support obligations should survive the deceased's death. That approach was also favoured by several of our correspondents. While this approach describes with some certainty whose interests the testator should consider when making a will, and a minority of the Commission agrees with it, the majority of the Commission thinks that it is contrary to the fundamental purpose of dependant's relief legislation. The testator's death is a significant factor, and the majority of the Commission doubt whether principles which determine *inter vivos* obligations are appropriate to determine testate obligations. Some legal support obligations, perhaps, should not survive the testator's death. Moreover, legal support obligations are primarily founded upon providing for a dependant's need. Need, the majority has concluded, may be one factor, but it is not fundamental to determining the testator's moral obligations.

The English *Inheritance (Provision for Family and Dependants) Act, 1975*, after providing that the surviving spouse, former unmarried spouse, child or person treated as a child may apply, also permits persons being maintained by the deceased to apply. The New South Wales Law Reform Commission recommended that a person wholly or partly dependent, who was a member of the deceased's household, and who, in the court's opinion, ought not to have been left without provision, may apply. This approach was favoured in several submissions on the Working Paper. One submission suggested that legislation should define a list of relatives entitled to apply if they could prove dependency. That approach would resolve some problems that might otherwise arise with respect to giving notice to potential applicants under the *Wills Variation Act* of an application.

(ii) "Close Family"

A majority of the Commission has concluded that in order that a testator may know exactly to whom he owes moral obligations, the Act should state which relatives of the deceased are eligible to apply. In the usual course, a testator should consider providing for the following:

(a) surviving spouse;
(b) a person whose marriage to the deceased was terminated or declared a nullity, who was receiving or entitled to receive maintenance from the deceased at the time of his death;
(c) common law spouse who was cohabiting with the deceased for not less than two years immediately preceding his death or who, under the *Family Relations Act*, was receiving or entitled to receive maintenance from the deceased at the time of his death;
(d) the deceased's children, illegitimate children (subject to the *Adoption Act*), posthumous children, and step-children;
(e) grandchildren;
(f) grandparents;
(g) parents;
(h) brothers, sisters, half-brothers and half-sisters.

This list represents people whom the deceased might have considered as close family. The concept of "family" may in one sense denote a close group of individuals united by ties of blood or marriage. It may also include unrelated individuals who provide one another with mutual financial and emotional support. The list includes the deceased's spouse and children, and others who might occupy positions analogous to those, such as a common law spouse and informally adopted children of the deceased's spouse. The list goes slightly beyond the deceased's spouse and children, or individuals regarded as spouse and children. Parents and grandparents are also included. They are included because succession rights, and the obligations protected by the *Wills Variation Act*, should tend to be reciprocal. If in certain circumstances a grandchild is entitled to share in his grandfather's estate, in similar circumstances, if the grandchild predeceased his grandfather, it is likely the grandfather should have a similar right to share in the grandchild's estate subject to the rights of nearer degrees.

While the list of applicants has been compiled by selecting persons who might have been considered members of the deceased's family, the criterion of "family" has not been used restrictively. For example, by listing those entitled to apply, we have tried to avoid restricting eligible applicants to those who lived as members of the household in which the deceased lived. An applicant's residence should not affect his eligibility to apply.

We have considered whether the Act should permit persons treated by the deceased as his children to apply for a share in the deceased's estate. We were concerned, however, that persons whom the deceased had been kind to, or even persons whom he had voluntarily maintained, might be entitled to apply. Generosity in itself should not create obligations.[251]

We are concerned that expanding the list of those entitled to apply should not constitute an invitation to litigate. The court should have jurisdiction to hear applications from members of the deceased's family, where they have not been adequately provided for in the will. That leaves open a door for the prosecution of unmeritorious claims. Those claims should be discouraged through the imposition of costs. Any restriction on the ability of the de-

[251] *See, e.g. Antoine v. Lavesque*; *Thomas v. Lavesque* [1954] O.W.N. 641 (Ont. H.C.), *aff'd* [1955] O.W.N. 134 (Ont. C.A.). The case concerned the *Fatal Accidents Act*, R.S.O. 1950, c. 132, s. 1(a). A niece, who had been maintained by the deceased, applied under that Act asserting that the deceased, by providing her with maintenance, had stood *in loco parentis* to her. It was held that, notwithstanding the deceased's generosity, maintenance alone did not evidence that he had accepted parental responsibilities with respect to his niece; in *Kourtev v. Lusher* (Unreported Eng. Ch. D. decision), December, 1981, *per* Wood J. Guardian Gazette, vol. 79, no. 8, Feb. 24, 1982, the deceased's common law spouse applied for a share of the deceased's estate. Evidence disclosed that the deceased (who before his death had returned to his lawful wife) had taken steps to divest himself of any responsibility for the plaintiff of a capital nature, as well as abandoned any responsibility for her maintenance. Her application was unsuccessful.

ceased's spouse or children to apply risks fettering the court's power to provide a remedy in these circumstances. In the opinion of the majority of the Commission, no threshhold requirement should be required for the deceased's spouse and children to bring an application.

For more remote relations, however, less often will they be entitled to any portion of the deceased's estate. The risk of nuisance claims increases. Many of our correspondents were concerned that the result of expanding the relations who may apply under the *Wills Variation Act* would be an explosion of unmeritorious claims against estates. The Commission shares that concern. A balance must be struck between ensuring that the courts are able to hear meritorious claims of more distant members of the deceased's family, and limiting the number of nuisance claims that may be brought. For that reason, a majority of the Commission has concluded that grandchildren, grandparents, parents, brothers, sisters, half-brothers and half-sisters, to bring an action, must have been dependent on the deceased at the time of his death. If an application is brought by one of these people who was not dependent on the deceased, that issue can be dealt with summarily.

By "dependent," we mean that the applicant must have relied upon the deceased for some financial support. We have considered whether this threshhold requirement should be more rigorously defined. Our conclusion is that the degree of dependency need not necessarily be substantial. The deceased need not have been the sole source of support for the applicant for the applicant to have been dependent. On the other hand, the receipt of occasional gifts of small sums of money would be unlikely to constitute dependency. Dependency is a question of fact which can be safely left to the courts to resolve.

(iii) Former Spouses

The list of eligible applicants includes former spouses. As a general proposition, we believe that the rights of spouses, upon marriage dissolution, should be governed by matrimonial legislation. In British Columbia the *Family Relations Act* governs the *inter vivos* mutual obligations of spouses upon marriage break-up. Dissolution of marriage should entail the cessation of all dealings between the spouses, and the *Divorce Act* and the *Family Relations Act* are primarily directed toward that goal. Nevertheless, it must be recognized that in many cases it is impossible to sever all ties between spouses. One need only consider a commonly occurring example, maintenance payments by one spouse to another which persist long after dissolution of a marriage. The question of defining when succession rights should arise, and distinguishing those situations from circumstances where *Family Relations Act* rights should govern, is more fully discussed in the next chapter.

Notwithstanding the general proposition that rights of spouses upon marriage break-up should be governed by matrimonial legislation, there is some doubt whether rights which arise under matrimonial legislation may be exercised after the death of one spouse. This too is discussed in greater detail in the next chapter.

There is therefore agreement among the Commission that even after marital breakdown or dissolution, a former spouse, in certain circumstances, should be entitled to apply under the *Wills Variation Act*.

There are several approaches to granting eligibility to former spouses. One view is that the matter should be left to the court's discretion, since, as with any other applicant, the question of whether the deceased owed any moral obligation to his former spouse is a question which can only be

answered by weighing numerous factors, not strictly susceptible to codification. Another view is that a former spouse should be entitled to apply only if *Family Relations Act* rights are foreclosed by the deceased's death. A related position is that only a former spouse who is receiving maintenance from the deceased should be entitled to apply. In a sense, the *Wills Variation Act* would ensure that adequate funding for the deceased's maintenance obligations to the former spouse would be secured notwithstanding his death.

An issue upon which there is very little authority, is whether a maintenance agreement or order which is stipulated to be for the lifetime of the recipient, may be varied under the *Divorce Act* after the death of the person paying it. It is generally agreed that maintenance can be for the lifetime of the recipient[252] and that a maintenance order that is not specifically for the recipient's lifetime terminates upon the death of the person obligated to pay it.[253] The issue of whether, after the death of a person paying maintenance, a maintenance agreement could be varied under the *Divorce Act* was raised in a recent Alberta decision, *Burns* v. *Burns*.[254] After a careful consideration of the cases, Egbert J. concluded that the maintenance agreement, since it was for the lifetime of the supported former spouse, could be varied, and increased the amount payable to the surviving former spouse.

Whether or not *Burns* v. *Burns*[255] has conclusively settled that a maintenance agreement for the lifetime of the payee may be varied after the death of the person paying maintenance, there will be many cases where the agreement or order is not for the payee's lifetime.[256] In those cases a person's obligation to pay maintenance will cease at his death. It is conceivable, however, that the surviving former spouse will still require maintenance.

The English *Inheritance (Provision for Family Dependants) Act 1975*, gives the court power to vary a maintenance agreement, which is specifically for the lifetime of the payee, when an application for dependant's relief is heard. Section 17 of that Act reads as follows:

Variation and revocation of maintenance agreements

17.-(1) Where an application for an order under section 2 of this Act is made to the court by any person who was at the time of the death of the deceased entitled to payments from the deceased under a maintenance agreement which provided for the continuation of payments under the agreement after the death of the deceased, then, in the proceedings on that application, the court shall have power, if an application is made under this section by that person or by the personal representative of the deceased, to vary or revoke that agreement.

(2) In exercising the powers conferred by this section the court shall have regard to all the circumstances of the case, including any order which the court proposes to make under section 2 or section 5 of this Act and any change (whether resulting from the death of the deceased or otherwise) in any of the circumstances in the light of which the agreement was made.

(3) If a maintenance agreement is varied by the court under this section the like consequences shall ensue as if the variation had been made immediately before the death of the deceased by agreement between the parties and for valuable consideration.

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[252] *Smyth* v. *Smyth*, [1971] 3 O.R. 132, 19 D.L.R. (3d) 628, 6 R.F.L. 75 (H.C.); *Meyer* v. *Meyer*, (1974) 18 R.F.L. 105 (Man. Q.B.); *Krause* v. *Krause*, [1976] 2 W.W.R. 622, 64 D.L.R. (3d) 352 (Alta. S.C.); *Armel* v. *Armel*, (1974) 17 R.F.L. 71 (Ont. H.C.); cf. *Black* v. *Black*, (1981) 46 N.S.R. (2d) 361 (N.S.S.C.); 89 A.P.R. 361; *see also* Donald J. MacDougall, "Alimony and Maintenance," *Studies in Canadian Family Law*, (1972) (ed. Mendes Da Costa) at 341; *see also Baker* v. *Baker*, (1976) 28 R.F.L. 78 (Ont. H.C.); *Horne* v. *Roberts*, [1971] 4 W.W.R. 663 (B.C.S.C.); *Re Whitelock*, [1975] 6 W.W.R. 86 (B.C.S.C.); *Re Finnie and Rae*, (1977) 16 O.R. (2d) 54 (H.C.); *Cooperman* v. *Cooperman*, [1978] 5 W.W.R. 518 (B.C.S.C.); *Norgard* v. *Norgard*, (1978) 8 R.F.L. (2d) 268 (Ont. C.A.); *Brocklebank* v. *Brocklebank*, (1976) 25 R.F.L. (B.C.S.C.).

[253] *Hall* v. *Hall*, (1975) 7 Nfld. & P.E.I.R. 265, 3 A.P.R. 265 (Nfld. S.C.).

[254] [1981] 6 W.W.R. 685, (1982) 129 D.L.R. (3d) 178 (Alta. Q.B.); *see also Wells* v. *Wells Estate*, noted in the Canadian Family Law Guide, Feb. 12, 1982, 25, 525 (Sask. Q.B.).

[255] *Ibid.*

[256] *See, e.g., Gwynn* v. *Forsythe*, (1982) 40 B.C.L.R. 358 (B.C.S.C.).

> (4) In this section "maintenance agreement", in relation to a deceased person, means any agreement made, whether in writing or not and whether before or after the commencement of this Act, by the deceased with any person with whom he entered into a marriage, being an agreement which contained provisions governing the rights and liabilities towards one another when living separately of the parties to that marriage (whether or not the marriage has been dissolved or annulled) in respect of the making or securing of payments or the disposition or use of any property, including such rights and liabilities with respect to the maintenance or education of any child, whether or not a child of the family in relation to that marriage.

We are not convinced that such a provision is necessary. It confirms, of course, that a maintenance agreement can be varied after the death of the person paying maintenance. As an ancillary power when considering entitlement to dependant's relief, it is unlikely that it makes any difference to the current position in British Columbia. Entitlement to maintenance will necessarily be considered by the courts. Any order made by the court will take that factor into account. Even if the maintenance order or agreement cannot be varied, the surviving spouse's interest in the deceased's estate could be varied to take into account benefits received under maintenance agreements. The difference between directly varying maintenance payments, or taking them into account when making a dependant's relief order, is not significant.[257]

In the Working Paper we tentatively concluded that the Act should not restrict a former spouse's eligibility to apply. It was unlikely the courts would exercise their discretion in favour of a former spouse after the deceased and the applicant had settled their financial affairs. Nevertheless, there might be cases where a former spouse ought to be entitled to provision. Upon reconsideration, the Commission has concluded that eligibility to apply should depend upon entitlement to maintenance. This position is a compromise. It recognizes that if the former spouse was not entitled to maintenance, all ties between the spouses had been effectively severed, and no obligation persisted beyond that. If the former spouse was entitled to maintenance, the court should have jurisdiction to determine the extent of the deceased's moral obligation to provide for the former spouse.

It should be observed that in England the *Inheritance (Provision for Family and Dependants) Act 1975*[258] permits a former wife of the deceased who has not remarried to apply to the court for a share of the deceased's estate if the deceased's will "is not such as to make reasonable financial provision for the applicant." *Re Fullard*[259] is a recent decision on that section. In that case a husband and wife after 40 years of marriage, divorced. Their sole asset was the matrimonial home. The husband transferred his interest, valued at £9,000, to his wife for a lump sum of £4,500. The husband made a new will disinheriting his former wife. The husband died two years after the divorce. His former spouse applied for provision to be made for her out of his estate. At first instance and upon appeal, the former spouse's claim was rejected. Purchas J. said:[260]

> There may well of course be developments which would enable an ex-spouse to seek relief with some chances of success under this Act, such as Ormrod L.J.

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[257] *See e.g. Bourret* v. *Bourret*, (unreported Ont. Dist. Ct.decision) (1981) 12 A.C.W.S. (2d) 62: defendant applied to stay action by plaintiff for arrears of support due under a separation agreement until after plaintiff's dependant's relief action resolved. The application was dismissed. The validity and enforceability of the separation agreement was a material factor in the dependant's relief application.

[258] C. 63, s. 1 (b).

[259] [1981] 3 W.L.R. 743 (C.A.); *see also Kourkey* v. *Lusher*, (1981) Times, 9 Dec., Family Division, Wood J. noted *supra* at n. 260.

[260] *Ibid.* at 751; *see also, Granfield* v. *Williams*, (1981) 23 R.F.L. (2d) (B.C.C.A.), where the court acknowledges that orders respecting maintenance or division of property on marital dissolution should take into account the spouse's lost rights to succession. Presumably a court hearing an application on behalf of a former spouse will be alive to the fact that the court's order with respect to maintenance, etc., was designed in part to compensate for lost rights of succession.

> has already mentioned (and at the risk of repetition I mention them again here) where there has been a long period of time since the dissolution of the marriage in circumstances in which a continuing obligation to support the ex-spouse has been established by an order of the court—by consent or otherwise—under which periodical payments have been, and continue to be, made up to the date of the death. There may be circumstances such as envisaged by Mr. Reid, where the death itself unlocks a substantial capital sum of which the testator should have been aware, and from which, had he made a will at the time immediately before his death, he ought, within the criteria of this Act, have made some provisions. There may be other incidents, of further accretion of wealth, but I doubt that the mere fact of accretion of wealth after the dissolution of the marriage would of itself justify an application. An application would only be justified if all the circumstances of the case and all the considerations set out in the Act made it reasonable that the testator should have made some provision as at the time of his death for the applicant.

Because the courts in England now enjoy wide powers to make appropriate capital adjustments between spouses after divorce, there would be very few cases where a former spouse could successfully apply for relief under dependant's relief legislation. Under the *Family Relations Act* courts in British Columbia possess powers similar to those enjoyed by courts in England to ensure that the division of property between spouses is fair.

One might conclude, therefore, that in British Columbia it will be rare that a former spouse will be successful in an application under the *Wills Variation Act*. Permitting former spouses to apply, however, will serve to prevent injustices in those cases where the *Family Relations Act* has not brought about a fair division of family property between the spouses.

A former common law spouse may also have been receiving, or entitled to receive, maintenance from the deceased at the time of his death. The *Family Relations Act* uses the following definition to determine when *inter vivos* support obligations arise:[261]

> "spouse" . . . includes . . . except under Part 3, a man or woman not married to each other, who lived together as husband and wife for a period of not less than 2 years, where an application under this Act is made by one of them against the other not more than one year after the date they ceased living together as husband and wife.

We can see no reason, where there are rights to maintenance, to distinguish between a former spouse or a former common law spouse who was receiving, or entitled to receive, maintenance from the deceased at the time of his death. We have also recommended this approach under the *Family Compensation Act*.[262]

The English Act bars a former spouse who subsequently remarries from applying. While in most cases remarriage will remove any obligation imposed on the deceased to provide for his former spouse, there may be occasions where the former spouse may be entitled to relief. One can envision for example a marriage of long duration with the deceased, a grossly unfair division of matrimonial property on marital break-up, an ill-considered and tragic second marriage by the former spouse which breaks up leaving her

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[261] Section 1.

[262] *See* Minor Report No. 61, *Standing of a Common Law Spouse to Apply Under the Family Compensation Act*. The status a common law spouse should have depends upon resolving difficult policy decisions. The Commission has had to deal with this issue in the context of various aspects of the law, and, in general, our approach has been to ensure that the rights of one common law spouse arising upon the death of the other common law spouse be consistent with their *inter vivos* rights under the *Family Relations Act*. It is inappropriate to consider expanding rights of common law spouses in a project confined to succession. We recognize, however that a strong argument can be raised in favour of further rights, and that should be the subject of a separate study. For example, the surviving common law spouse may not qualify under the *Family Relations Act* but still be responsible for the upbringing of the deceased's children or children of the relationship. In that case, notwithstanding the duration of the relationship, the common law spouse should probably still be entitled to support. That was the conclusion of the New South Wales Law Reform Commission: *see Report on De Facto Relationships* (1983) at 161.

impoverished. If the deceased dies and his estate is immense, might not a court find in favour of the remarried spouse? We see no need to bar a former spouse's eligibility to apply because he or she has remarried.

(iv) Result of Expanding the Class of Applicants

While the categories of persons we think should be eligible to apply under the *Wills Variation Act* include people to whom the deceased may have owed legal support obligations, or who may have been dependent upon the deceased for maintenance, the court's discretion to make provision for them, except for more remote family members, is not fettered by the initial requirement that they must be in need to qualify, nor is the court's order necessarily restricted to providing maintenance to a worthy applicant. This approach, in the opinion of the majority, preserves the court's broad discretion to ensure that the deceased recognizes and fulfills his moral obligations as well as describes specifically whose interests the testator should consider when making his will.

It is important to note, however, that eligibility to apply does not guarantee that the application will be successful. The testator may owe no moral obligation to provide for, say, dependent parents, or brothers and sisters. In most cases, it should follow that the more distant are the ties of blood or duty, the less likely an award will be made, or the smaller the entitlement of the applicant. These are issues which should be left to the discretion of the court. The concern is to ensure that the parties who may have some claim to share in the testator's estate are permitted to come before the court despite the potential for increased litigation. Having accomplished that, it is up to the courts to determine what, in the circumstances, constitutes fair or adequate provision.

Expanding the classes of eligible applicants is unlikely to achieve results significantly different from those under the present Act, since it is unlikely that a testator's moral obligations will extend beyond providing for the surviving spouse and children. In rare cases, however, the testator will owe moral obligations to provide for people other than his spouse and children, and in those cases the courts should have the jurisdiction to make an appropriate award. The disadvantages of this recommendation lie mainly with its potential for litigation. As an abstract proposition, the possibility of increased litigation would appear to be a serious argument against expanding the categories of applicants. But, as a practical matter, since seldom will the testator owe moral obligations other than to provide for his spouse or children, litigation should not increase. Actions without merit would be penalized by costs. On the other hand, by expanding the categories of applicants under the Act, the court would be able to hear meritorious actions that currently they are unable to entertain.

(v) Recommendation

The Commission recommends:

10. (1) That the Wills Variation Act *be amended to permit the following persons who survive the deceased to apply:*

(a) spouse;

(b) a person whose marriage to the deceased was terminated or declared a nullity if receiving or entitled to receive maintenance from the deceased;

(c) common law spouse who, immediately preceding the death of the deceased,

(i) was cohabiting with the deceased for not less than two years, or

(ii) was receiving or entitled to receive maintenance, pursuant to the Family Relations Act, *from the deceased;*

(d) the deceased's children, posthumous children, and stepchildren;

(2) That the Wills Variation Act *be amended to permit the following persons to apply if they were dependent on the deceased immediately prior to his death:*

(a) grandchildren;

(b) grandparents;

(c) parents;

(d) brothers, sisters, half-brothers and half-sisters.

(3) For the purposes of paragraphs (1) and (2), when determining relationships to the deceased, no distinction should be made between children of married or unmarried parents.

One submission challenged the merit of determining eligibility to apply based upon kinship:

> First, we are of the view that the Act is really designed to assist persons belonging to the nuclear family who may reasonably be said to have a demand upon the considerations of the deceased, and, if this mode of determining forced shares is to be maintained, we would retain this policy. Secondly, we feel that the inclusion of persons in the greater family raises connotations with which the report does not deal, and which concern us considerably. That is to say, if grandchildren, including illegitimate persons, grandparents, brothers and sisters, and half-brothers and half-sisters are to be included within the Act, persons who may have had quite remote associations with the deceased and his immediate family, why should the Act not also include friends of a lifetime? We have in mind here the two persons who may have shared their lives and their property together over many years, and in circumstances where one has a reasonable expectation of the other as to property which he or she is to enjoy after the death of the first to die. In some cases there is a sexual relationship between friends, but in our view that is an irrelevant matter. It merely serves to underline the degree of closeness between the friends. In other words, we cannot see why in 1982 remote relationships of blood are thought to be properly within the considerations of the deceased, while persons who are not associated by blood, but who have been close to the deceased and may also have had expectations of him or her, should be denied any right to make application under the Act. These persons are thrown back on the law of quasi-contract, and of constructive trust.

Our correspondent's concerns are answered in part by the fact that the list of applicants defines who may apply, but does not guarantee that any are entitled to share in the estate. The deceased might well have been closer to his friends than his family, but that is not reason to impose an obligation on him to provide for them. It may be that the importance of the family in contemporary society has diminished. Nevertheless, we believe a person is under an obligation to consider the needs of his family. Members of the nuclear family may be entitled to more than maintenance. More remote family members may be entitled to nothing. But the court should have discretion to determine whether the deceased should have made provision for them, particularly if they are in need. The same considerations do not arise between the deceased and close friends who survive him.

3. Relevance of Conduct

The New South Wales Law Reform Commission concluded that while character and conduct were relevant, the court did not require statutory direction or restriction when weighing that factor. They said:[263]

[263] *Supra*, n. 231 at 39.

2.9.13 Section 9 (5) (a): character and conduct. The substance of section 9 (5) (a) was included in the draft bill which formed part of the Working Paper. It states what we believe to be the existing law. One commentator suggests, however, that the paragraph should state that the Court *shall* have regard to the character or conduct of an eligible person. He argues that the Court should be directed to refuse an order where the conduct of the eligible person materially damaged the deceased person in his lifetime. In his words: "Why should a worthless son get an order when the whole estate is diminished by his conduct?" The same commentator would overrule the decision in *Re Gilbert* and have the new Act provide, for example, that the Court shall have regard to attempts by an eligible person to deceive the Court about the merits of his application. On the other hand, another commentator says that the character or conduct of an eligible person should never be considered by the Court because, in most cases, evidence of it comes from close relatives and the evidence is unreliable in that it is highly coloured by self-interest. In our view, section 9 (5) (a) is adequate as it stands. We think it right that the Court may look at the character or conduct of an eligible person. But, because this is an area which calls for the making of value judgments, we also think it right that the Court should be able to give effect to its view of contemporary community standards on "conduct disentitling" without statutory direction or restriction.

We agree with the New South Wales Law Reform Commission that the courts do not require guidance on what kinds of character or conduct are relevant. We recognize that a wide range of acts by the applicant, which may imply poor character or conduct, should not disentitle him from eligibility for an award. It may well be that the only conduct which will disentitle an applicant is that which amounted to a repudiation of the relationship between the deceased and the applicant.

For example, conduct on the part of the surviving spouse which amounts to repudiation of marital obligations may be a disentitling factor. Similarly, conduct on the part of an applicant that repudiates the parent/child relationship between the applicant and the deceased may disentitle the applicant. These are, however, issues of fact and it is unlikely that statutory guidelines will be helpful to the court. Has a child, who is consistently disobedient or who disappoints his parents' expectations, repudiated his relationship with them? This is a question which can be answered only by reference to the actual facts of the case. Moreover, as we noted earlier, while conduct is relevant, it is only one of many factors to be taken into account by the court, and even extreme misconduct or bad character may be overridden by other considerations.

Section 3 of the *Wills Variation Act* provides:

> **Court may make order subject to conditions**
>
> **3.** The court may attach the conditions to the order that it thinks fit, or may refuse to make an order in favour of a person whose character or conduct, in the court's opinion, disentitles him or her to the benefit of an order under this Act.

Section 2 (3) of the Act provides:

> In an action under this section the court may accept the evidence it considers proper of the testator's reasons, so far as ascertainable,
> (a) for making the dispositions made in his will; or
> (b) for not making adequate provision for his wife, husband or children, including any statement in writing signed by the testator.

The combined effect of these two sections is that the courts have full power to review the conduct of an applicant, and generous discretion to determine what should constitute disentitling conduct. There is no need for specific guidelines on what kinds of character or conduct are relevant.

We think, however, that the drafting of section 3 of the Act could be improved. It fuses two separate powers of the court within one section. The court's ability to attach terms and conditions to the order it thinks fit should be contained in a section separate from the court's authority to refuse to make an order in favour of an applicant whose character or conduct should disentitle

him to the benefit of such an order. Moreover, the section should be revised to clarify that the court may make such order as it thinks appropriate in light of the applicant's character or conduct, as well as refuse to make an order in favour of such an applicant. As it is presently drafted, the section appears to permit the courts only the power to refuse to make an award on behalf of an applicant whose character is flawed or whose conduct is deplorable. These points are technical objections only. It must be observed that the courts are not troubled by these imperfections of drafting.

4. Time for Determining Entitlement

The preponderance of case authority in British Columbia favours the testator's death as the relevant time for determining whether proper provision has been made for a dependant's maintenance.[264] The principal argument in favour of this time is that it is the last opportunity for the testator to recognize his moral obligations. It is, nevertheless, artificial to distinguish between these times on the basis that the court's principal concern is ensuring that the testator recognizes his moral obligations.

Several correspondents concluded that adequacy should be determined at the deceased's death, in the interests of certainty, and because that was the last chance the testator had to consider what might constitute adequate provision for his family. The majority of our correspondents felt that adequacy should be determined at the date of the hearing.

The Ontario *Succession Law Reform Act*, provides as follows:

> 58 (3) The adequacy of provision for support under subsection 1 shall be determined as of the date of the hearing of the application.

The court should be able to take into account changes in circumstances unforeseeable at the time of the deceased's death and weigh the facts existing at the time of the hearing. We have concluded that the courts should be permitted to consider the actual circumstances of the case at the time it hears the action. Only then can it be reasonably certain that the order it makes is appropriate.

The Commission recommends:

11. That the Wills Variation Act *be amended to direct the courts to determine the adequacy of the testator's provision for the applicant as at the date of the hearing.*

5. Time for Valuing the Estate

In British Columbia the case law has established that the estate should be valued at the time of the testator's death.[265] Our arguments with reference to the appropriate time for determining entitlement apply with equal force to the appropriate time for valuing the estate. The order the court makes should be based on the actual value of the estate at the time of the hearing, having regard to foreseeable circumstances. An order based upon the estate's value at the testator's death may not be unjust. Equally, it may be entirely inappropriate.

The Commission recommends:

12. That the Wills Variation Act *be amended to provide that the court shall have regard to and may hear evidence respecting the value or the composition of the assets of the estate or part of the estate as at the date of the hearing.*

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[264] *See supra* Chapter III. E (1).

[265] *See supra* Chapter III. E (1).

6. Limitation Periods

(a) Extending the Limitation Period

Undeniably, there must be some limitation period beyond which a *Wills Variation Act* application may not be brought. The Chief Justice's Law Reform Committee of Victoria observed:[266]

> . . . a general power to make provision at any time out of the estate of a deceased person for the maintenance and support of eligible persons would result in great inconvenience, and in all likelihood, in not a little injustice.

The six month period within which an application must be made strikes a reasonable balance between the interests of potential applicants and those of the beneficiaries under the will. It does not unduly delay administration since during that period preparations can be made for distribution, creditors paid and beneficiaries of the estate sought. Moreover, the Act provides that an application by one is deemed to be on behalf of all entitled applicants. Thus, the severity of the limitation period may be mitigated in circumstances where one applicant has commenced an action in time. Other applicants may join in the action even after the six month period has expired. The interests of those entitled to share in the estate and those who may bring an application for a share are equally balanced. Administration should not be unduly delayed.

Situations will arise, however, where the limitation period will have expired and, without culpable fault on the part of the potential applicant, the application is barred. In some jurisdictions, the courts may extend the limitation period. An order made pursuant to an application brought outside the six month limitation period will bind only undistributed assets. Some jurisdictions have legislation to this effect. For example, section 14 (2) of the *Uniform Dependants Relief Act* provides:

> A court, if it considers it just, may allow an application to be made at any time as to any portion of the estate remaining undistributed at the date of the application.

In the Working Paper, we discussed the possibility of a limited discretion to permit time-barred applications. There may be circumstances in which the courts should be able to allow an application which is out of time. A further limited period during which the courts could permit an application might not significantly prejudice the interests of those entitled to share in the estate. For example, a time-barred applicant might be permitted to apply at any time before the distribution of the estate begins. Such a test, however, would appear to be simultaneously too narrow and too wide. An estate embroiled in litigation might not be distributed for several years. Permitting someone to bring an application several years after the deceased's death would only further delay distribution of an estate, the tardiness of which may already have severely diminished the interests of its testate or intestate successors. Allowing applications to be brought out of time only up until the commencement of distribution may also be too narrow a test. For example, a testator may disinherit his wife in favour of his two children. Six months pass before his widow brings an application, and the executor of the estate permits the two children to select between personal effects of the deceased which possess sentimental, and not monetary, value before liquidating the balance of the estate for distribution. Should distribution of an insignificant portion of the estate prevent a time barred but deserving person from applying for a share in the estate?

In the Working Paper it was tentatively proposed that an order might be made beyond the initial limitation period if:

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[266] *Testator's Family Maintenance: Availability of Undistributed Assets*, at 2.

(a) it is proper to relieve that portion of the estate already distributed from the incidence of the order; or
(b) it would not be unfair in the circumstances to require parties who have received assets to bear their share of the burden of the order.

It should be remembered that the court has power to exonerate or relieve portions of the estate from bearing their share of an order. Relieving part of the estate from the burden of an order would not necessarily throw that burden on the remainder of the estate. This power would be of significance when part of the estate is distributed before an application is brought. The court could direct that the undistributed estate bear only the rateable portion of an order it would have borne had no portion of the estate been distributed. Legislation permitting courts to extend the limitation period, subject to the two qualifications mentioned above, might also define the court's power to exonerate the undistributed estate from bearing the full burden of the order.

In one respect this approach did not strike a reasonable balance between the settled expectations of persons entitled to an interest in an estate, and the claims of a person who fails to commence the proceeding in time. Under the current law, beneficiaries, after six months, can be assured their interest in the estate is safe. There is no possibility of an application being commenced which will cut back their entitlement. They may make plans, commit funds, or otherwise change their position in reliance upon their certain expectations.

Allowing an application to be heard after it is limitation-barred removes that security. Beneficiaries should not have to worry indefinitely that an application might be commenced. One option is to adopt a further time limit in which the courts would have discretion to hear a time-barred application. The selection of any such time would be necessarily arbitrary. Perhaps no application should be brought beyond the earlier of the expiry of one year from entry of the grant of probate or administration in the court registry, or the completion of distribution of the estate. The initial six months limitation would serve to protect most potential applicants and beneficiaries of the estate. After six months, distribution could begin. A further period of up to six months, during which, in suitable cases, the courts may permit an application to be brought, would go a long way towards alleviating potential injustice without unduly prejudicing the interests of those entitled to a share in the estate. Beyond that, in the interests of finality, no application would be brought.

The majority of submissions received on this proposal stated that there should be no extensions of the limitation period. Upon reconsideration, the Commission has concluded that while there may be situations in which jurisdiction to extend the limitation period would be desirable, greater weight must be given to the interests of the deceased's beneficiaries. The initial six month limitation provides adequate protection to potential applicants, although it may be desirable as suggested in one submission to require on the notice of an application for probate, a warning of the six month limitation on applications under the *Wills Variation Act*.

(b) Calculating the Limitation Period

The six month limitation period runs from the "issue of probate." This term is not defined. It has been judicially considered and held to mean that the period runs from the date upon which the grant of letters probate or the grant of administration was entered in the court registry. The time from which the limitation period runs should be clarified. The date the grant is entered in the

court registry is a convenient and easily ascertainable time. Our correspondents agreed with this approach.

One submission suggested that an application under the *Wills Variation Act* should be commenced from the registry in which the application for a grant of letters probate or of administration is filed. Problems can arise where a writ is issued but not served within six months from the application for probate. The deceased's personal representative, unaware of the application under the *Wills Variation Act*, may begin distribution of the estate. Requiring an application under the *Wills Variation Act* be commenced from the registry in which the application for a grant of letters probate or of administration is filed would permit the deceased's personal representative to determine whether there were any pending applications merely by searching that registry.

While we recognize that this problem should be addressed, we do not think it practical to require the writ to be issued from the same registry in which the application for probate is made. That would, for example, prevent an applicant from issuing a writ until the application was made.

In our opinion, a person issuing a writ of summons under the *Wills Variation Act* should be required to either serve the deceased's personal representative, or file notice of the action in the registry in which the application for probate is made within six months of that application. The six months corresponds to the current limitation period on applications under the *Wills Variation Act*. Nothing prevents the applicant from issuing his writ from a convenient registry. Requiring either service or the filing of a notice ensures that the deceased's personal representative will be aware of the application before he commences distribution of the estate.

The Commission recommends:

13. That the Wills Variation Act *be amended by deleting section 10 and adding a section comparable to the following:*

(1) An action shall not be heard by the court at the instance of a party claiming the benefit of the Act unless, within six months from the entry of the grant of letters probate or the grant of administration in the court registry in the province, or the resealing in the province of a grant of letters probate or administration,

(a) the action is commenced; and

(b) the writ of summons commencing the action is served on the deceased's personal representative, or notice of the action is filed in the court registry in which the probate proceedings are commenced.

It should be observed that problems of delay may still arise if the applicant under the *Wills Variation Act* does not pursue his or her claim expeditiously. This is an issue we hope to address in a separate project on probate practice and procedure.

(c) Posthumous Children

In our earlier deliberations, we considered making an exception in favour of posthumous children with respect to the time within which an application must be brought. A child of the deceased could be born after his death and after the limitation period has expired. One method of taking this into account is to permit an application on behalf of such a child to be brought within six months of the day the child was born. Providing that an application may be brought on behalf of a posthumous child within six months of birth, and that a child includes a child born out of wedlock, may place the deceased's personal

representative at risk. In very few circumstances will the personal representative be able to satisfy himself that there is no possibility of an application being brought on behalf of a child not born until after the six month limitation period. A cautious or well-advised personal representative, unless relieved from personal liability, would be reluctant to distribute an estate until fifteen months after the deceased's death (allowing nine months for gestation, and six months limitation for an application by a possible posthumous child). Delayed administration is in no one's interest.

Another option, which would not require an exception to the limitation period nor suspend distribution beyond six months, is to permit an application to be brought on behalf of the posthumous child before his or her birth. If the application is heard by the court before the child's birth, any order made could be conditional upon the child surviving birth or any other reasonable period. The power to make an order, subject to such conditions as the court may think fit in the circumstances, is one already enjoyed by the courts under section 3 of the *Wills Variation Act*. The Act need only be amended to provide that an application may be brought on behalf of a posthumous child before birth. In our opinion, this is the simplest way of protecting the interests of a posthumous child without further delaying administration or placing the deceased's personal representative at risk.

Two correspondents noted that a number of procedural problems arise from this approach. For example, to whom should notice be given? Who should bring the application? What should happen if the child is not born alive, or dies before the conclusion of the hearing?

These questions are more theoretical than practical. The posthumous child's parents will receive notice of an application for probate, since they would be entitled to apply under the *Wills Variation Act*. If the child is illegitimate, one or other of the parents will still be entitled to apply under the *Act*. The issue of who should bring the application is no different if the applicant were any other infant entitled to apply. We also anticipate that a court hearing will not take place until after the child's birth. The recommendation that an application may be brought on behalf of a posthumous child is only to ensure that the writ of summons may be issued in time. We doubt that the court would permit the application to be heard until after the birth of the child. In any event, these problems will rarely arise, and a complex response is not called for.

The Commission recommends:

14. That the Wills Variation Act *be amended to permit an application to be brought on behalf of a posthumous child before birth.*

7. Assets Available to Satisfy an Order

Freedom of testation parallels the freedom of a person to alienate his property during his lifetime. A person who can dispose of property *inter vivos* should be able to dispose of it by testamentary instrument. The *Wills Variation Act* makes substantial inroads into the principle of freedom of testation. As we noted earlier, a testator may avoid the *Wills Variation Act* merely by disposing of his property during his lifetime or adopting some other qualified form of transfer. If this is a real problem, rather than an apprehended possibility, the only means of remedying it is to make inroads on the testator's freedom to alienate his property during his lifetime. That is a substantial step to take, merely to ensure proper provision for dependants who may not actually be owed legal support obligations.

If a person is set on evading the Act, he need only remove his assets from the jurisdiction, or establish domicile elsewhere. Very few individuals will leave the jurisdiction merely to avoid the problematical application of a revised *Wills Variation Act*. We do not regard this as a real problem.

The real problem in this area lies in balancing the respective interests of dependants and of *bona fide* recipients of assets disposed of by the deceased during his lifetime. Earlier we discussed six methods of avoiding the Act. These methods were: insurance contracts, outright gifts, *donatio mortis causa*, joint tenancies, *inter vivos* trusts and contracts to leave by will. We also mentioned kinds of property not caught by the Act, such as pension benefits. Several anti-avoidance solutions have been adopted or proposed in other jurisdictions.

The position in Ontario and New Zealand, and the position adopted by the Uniform Law Conference, are to be found in Appendices B, C and D to this Report.

The English Law Commission discussed at some length the arguments for and against anti-avoidance provisions. Professor Martyn, commenting on the English Act and the report of the English Law Commission, said:[267]

> The Commission accepted that there were arguments against such provisions. Gifts are often made to preserve the family fortune from the effects of capital taxation, and such gifts ought not to be challenged; it is often difficult to determine the true intention of the deceased; there is little evidence of any widespread mischief; the powers would be ineffective and could be avoided, for example by the purchase of an annuity; and attempts to prevent evasion can lead to great complication. However, balancing these arguments against the importance of ensuring that family provision laws are effective (which it considered overriding), the Law Commission recommended the scheme embodied in the Act. It is submitted that this was right. Measures to avoid the 1938 and the 1965 Acts do appear to have been taken by some testators, and the anti-avoidance provisions of the new Act should stop the worst examples.

The Queensland Law Reform Commission decided against recommending anti-avoidance legislation. They argued:[268]

> Although we see no particular vice in these provisions, we doubt whether these cases arise often enough to warrant the inclusion of complex provisions in our legislation in an attempt to counter them. A person may be generous in his lifetime but provision intended to defeat the policy of the legislation would need to be very generous and would necessarily deprive the donor a person already, by definition, estranged from his family—of his own wealth. It is possible for such a donation or contract to be called in question on the grounds of incapacity if motivated by so irrational a resentment and antipathy of the donor towards his family that a balanced judgment is absent—see *Cragg* v. *McIntyre* (1975) Supreme Court of New South Wales, No. 717 of 1970; and there is also the doctrine of undue influence to call such donations in question. Lastly, we feel that there must be an end to transactions, particularly where the title to property is involved, and we are loath to provide a new form of litigation the basis for the success of which must depend on establishing, after the death of a person, a highly improper motivation for his conduct.

We agree with the Queensland Law Reform Commission. In order to defeat the Act, the deceased will have had to have disposed of a great portion of his property, something most people are reluctant to do, if only for fear of prematurely impoverishing themselves. If the deceased intends to disinherit the surviving spouse, it is likely that marital breakdown will have occurred, and the surviving spouse will be protected under the *Family Relations Act* as to a one-half interest in family assets.

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[267] *Supra*, n. 179 at 40.

[268] *Supra*, n. 244 at 29.

We are concerned that anti-avoidance legislation cannot be framed to ensure that it will operate fairly and effectively. Many tax planning transactions would be open to attack. Surviving joint tenants would be prejudiced by having the tenancy severed, and innocent volunteers injured by having to repay gifts perhaps spent some time before the testator's death. The use of an objective test dependent upon an arbitrarily determined period in which such transactions can be attacked would have this effect. If intent to avoid the *Wills Variation Act* is required, in all probability very few transactions will be susceptible to attack. In the Working Paper we concluded that anti-avoidance legislation is not necessary. Our correspondents agreed. We see no reason to depart from that conclusion.

8. Orders Under the Act

As we mentioned earlier, the courts have a broad discretion as to the kind of order which might be made under the Act. The order can be lump sum or periodic, and subject to whatever conditions the court thinks fit. There are several kinds of orders where the extent of the court's jurisdiction requires clarification. These are:

(a) interim orders;
(b) suspensory orders;
(c) class orders;
(d) consent orders.

There is also some confusion over the court's power to vary an order it has made.

(a) Interim Orders

Often an applicant will require financial assistance pending the hearing of his application. A hearing may be delayed for many reasons. For example, it may be difficult to ascertain the extent of the deceased's estate. Until the value of the estate is determined, the court is not in a position to make a permanent order.

The Ontario *Succession Law Reform Act* provides for interim orders.[269] The Alberta Institute of Law Research and Reform recommended such a power.[270] The New South Wales Law Reform Commission, arguing in favour of providing a power to make interim awards, said:[271]

> We think that the Court should be able to intervene for the purpose of avoiding hardship pending a final decision in proceedings under the Act. Without fault on the part of the applicant or of the Court, it is sometimes many months after the death of a deceased person before the Court is able to determine finally a claim under the Act. In the meantime, the applicant may be without adequate funds for proper maintenance and yet funds may be lying idle in the estate. This situation may not occur frequently but when it does occur the Court should be able to intervene. To us, the possible availability of social services assistance is not a satisfactory answer to the problem.
>
> The proposal . . . is open to the objection that there will be little likelihood of the estate recovering moneys paid to an applicant who is eventually unsuccessful in his claim. This objection is valid and we do not have a complete answer to it. All that can be said is that the times when a person needs immediate assistance are likely to far outnumber the times an applicant is ultimately unsuccessful. And, the Court can be expected to be wary of making orders for immediate assistance in favour of applicants with very doubtful prospects of success.

We agree that the court should have power to make interim awards. It should be observed, however, that such an application will affect the interests of

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[269] Section 64.
[270] *Supra*, n. 8.
[271] *Supra*, n. 231 at 42.

beneficiaries under the will and other (potential) applicants as well as creditors of the estate. In the usual course, notice of an application for an interim award should be given to interested parties. In some cases, however, notice to all interested parties might constitute a substantial impediment. If the applicant's need for interim support is particularly pressing, the Court should have the power to hear an application quickly. In the Working Paper we tentatively proposed that such an application be heard *ex parte*. Some of our correspondents were apprehensive on this point, since the court's order could significantly prejudice other interests in the deceased's estate. Upon reconsideration, the Commisson has concluded that, in the usual case, notice of such an application should be served. The court, however, should have power, in exceptional circumstances, to permit the application to be heard upon service of the deceased's personal representative alone.[272]

The Commission recommends:

15. That the courts should have power to make interim awards to an applicant who is in immediate need of financial assistance.

16. That the application for interim support may be heard upon service of the deceased's personal representative, with leave of the court, or on such other terms as the court may see fit.

(b) Suspensory Orders

In our earlier discussion of suspensory orders, we observed that a suspensory order favours dependants (the applicants) over beneficiaries of the estate. The flexibility such an order gives a court to provide adequately for an applicant must be weighed against the prejudice which accrues from delayed administration.

Due to changes in the applicant's circumstances, an order may cease to provide adequate support. Conversely, the applicant's position may change for the better. Nevertheless, we do not think that the mere possibility of changed circumstances would justify suspending the distribution of the estate indefinitely. If, at the time of the hearing, there is a strong probability that the applicant's circumstances will change and further provision will be required, the court can set aside a lump sum from which a further award might be made. If the expected event does not take place the sum should fall back into the estate. This is a power the courts already possess, and it does not unduly prejudice the interests of other beneficiaries of the estate. Those correspondents who commented on this issue concluded that power to make a suspensory order was undesirable.

We have concluded that the courts should not possess a power to make a suspensory order.

(c) Class Orders

In New Zealand it has been held that the courts do not have jurisdiction to make an order setting up a trust fund in favour of a class of applicants.[273] The New South Wales Law Reform Commission listed the arguments for and against the jurisdiction to make such an order:[274]

> An argument against the notion of a class fund is that the Act is concerned with the claims of individuals, not with the claims of persons constituting a special class: that to create a situation where a person may succeed, by accruer, to a greater amount than is adequate for his proper maintenance is to offend the principle of

[272] *See Re Pulver*, (1983) 13 E.T.R. 1, 39 O.R. (2d) 460 (Ont. H.C.).
[273] *Re Maxwell*, [1954] N.Z.L.R. 720.
[274] *Supra*, n. 231 at 49.

> individual consideration. This argument may be sound but, in our view, a provision which enables a trustee to treat, say 4 young children as a group and not as 4 separate persons has merit in that it is both convenient and practical. Few parents try to spend equal sums of money on their children. If the present needs of one child are greater than the needs of another, then, as far as possible, the needs of the first child are satisfied out of family funds. This happens where the parents are living. We think that a trustee of a fund of this kind should be able to act with the same flexibility. And, if one child dies and in consequence more money is available to spend on, and eventually to be divided between, the other children, we do not see that that is a wrong result. If the parents were living, almost certainly the same result would follow.

We agree that this would be a highly flexible device for dealing with applicants who, while *prima facie* entitled to equal treatment, will, as circumstances change, have different needs.

Class gifts present various problems. We are not here directly concerned with the difficulties involved in identifying class members,[275] but with administrative problems that may arise from an order benefiting a class. For example, if the trustee of the order in favour of a class is empowered to make advancements from the corpus of the gift, possible prejudice to class members may occur. Subsequent court applications may be brought, either by class members who seek to protect their interests, or by the trustee in order to guard against personal liability.

In most cases, the courts should continue to make awards based upon an applicant's individual needs. That approach, in some cases, may be more difficult than making a class order. Notwithstanding potential administrative problems, we have concluded that the courts should have power to make an order for the benefit of a class. We are concerned that that power should only be used in appropriate cases, and that, for the most part, the courts should continue to make individual awards.

Comment received on this proposal in the Working Paper was divided. Those who disagreed with the proposal, however, appeared to be confused on the circumstances in which a class order would be made. It was suggested, for example, that there was no need to make an order for the benefit of a class, since all its members would be identified and represented at the hearing. The order contemplated would be used to permit a trustee to deal with members of the class in his discretion, according to their individual needs. It would not be used to make provision for unidentified members of a class.

(d) Variation of Orders

We noted earlier that courts possess a power to vary lump sum awards. The intended purpose of this power is to permit courts to decrease an award if the applicant's means have improved. Several jurisdictions have enacted or recommended that the courts should have a power to vary an order upwards.[276] It is possible that the courts' power under the British Columbia Act is framed broadly enough to permit the courts to increase an award. Our research, however, does not disclose whether the courts have ever used that power to increase an award.

Against a power to vary an order upwards it might be argued that uncertainty would result. Beneficiaries could not regard an interest received as fully theirs. It would be unfair to confine the incidence of an order to undistributed property. It is likely such a power would be used infrequently. The New South Wales Law Reform Commission observed that:[277]

[275] Some of those problems were addressed in Working Paper No. 32 on Interpretation of Wills.

[276] *E.g.*, Alberta, *see supra* n. 8; New South Wales, *see supra*, n. 243; Victoria, Chief Justice's Law Reform Committee, *The Family Maintenance Variation of Orders*, (Feb., 1973), New Zealand, Queensland, Western Australia, Tasmania.

[277] *Ibid.* at 59.

> . . . in Queensland where, since 1968, the Court has had the power to vary an order upwards, application for its use is seldom made. In short, any problem that might occasionally arise results from the Court's failure to deal with it at the proper time, the time of the making of the original order.

In favour of such a power, it may be argued that its flexibility permits the courts to make adequate provision for an applicant and to ensure that the provision it makes remains adequate. In inflationary and turbulent times, it is difficult to predict what the economy will do. Often the order sought to be varied will be in favour of the surviving spouse, and the beneficiaries affected will be more remote relations of the deceased.

We have concluded that the court's power to vary an award should remain as it is. Conceivably British Columbia courts have power to subsequently increase an order. Although we favour finality in the affairs of the deceased and his dependants, we do not think it advisable to limit the court's power to vary an award. It may be argued that very little is to be gained by interfering in the settled affairs of various people, merely in order to make further provision for an applicant that a court might have effectively done at the original hearing. Nevertheless, circumstances may arise where it is desirable to subsequently increase an award. This is an issue that should be left to the courts to determine on a case by case basis.

9. Incidence of the Order

We noted earlier a redundancy between sections 5 and 6 of the Act. Section 5 provides that payment of an order falls rateably upon the entire estate unless the court otherwise determines. Section 6 permits the court to exonerate portions of the estate from bearing their rateable portion of the order. Section 5 should be amended to clarify that the court power to exonerate is contained in section 6. One way of doing this is to amend section 5 by deleting "unless the court otherwise orders" and adding "subject to section 6". That is the approach adopted by the *Uniform Dependant's Relief Act*. This is a minor drafting point which should be considered if a new draft Act is prepared.

10. Kinds of Orders

The British Columbia Act gives the courts a wide discretion, not limited by specific guidelines, as to what kinds of orders it might make. The Ontario Act, on the other hand, does list the kinds of conditions a court may impose on an order. Section 63 of the Ontario *Succession Law Reform Act* provides:

> **63.**-(1) In any order making provision for support of a dependant, the court may impose such conditions and restrictions as the court considers appropriate.
>
> (2) Provision may be made out of income or capital or both and an order may provide for one or more of the following, as the court considers appropriate.
>
> (a) an amount payable annually or otherwise whether for an indefinite or limited period or until the happening of a specified event;
>
> (b) a lump sum to be paid or held in trust;
>
> (c) any specified property to be transferred or assigned to or in trust for the benefit of the dependant, whether absolutely, for life or for a term of years;
>
> (d) the possession or use of any specified property by the dependant for life or such period as the court considers appropriate;
>
> (e) a lump sum payment to supplement or replace periodic payments;
>
> (f) the securing of payment under an order by a charge on property or otherwise;
>
> (g) the payment of a lump sum or of increased periodic payments to enable a dependant spouse or child to meet debts reasonably incurred for his or her own support prior to an application under this Part;

(h) that all or any of the moneys payable under the order be paid to an appropriate person or agency for the benefit of the dependant;
(i) the payment to an agency referred to in subsection 58 (2) of any amount in reimbursement for an allowance or benefit granted in respect of the support of the dependant, including an amount in reimbursement for an allowance paid or benefit provided before the date of the order.
(3) Where a transfer or assignment of property is ordered, the court may,
(a) give all necessary directions for the execution of the transfer or assignment by the executor or administrator or such other person as the court may direct; or
(b) grant a vesting order.

The British Columbia *Wills Variation Act* simply provides that, "The court may attach the conditions to an order that it thinks fit . . ."[278] We are unaware of any need to specify the kinds of conditions that a court may impose. In our opinion, the flexibility of the court's discretion to fix appropriate conditions has not caused any difficulty.

It should also be observed that the British Columbia Act limits the courts' power to making either lump sum or periodic payment awards. Technically they would be unable to make a number of useful orders, such as the transfer of specific property, or a grant of a life estate in property. This technical limitation on the courts' power does not appear to have caused any problems, and, in part, it is mitigated by the courts' ability to determine the kinds of conditions to which an order is subject.

The strongest argument in favour of listing the kinds of orders the court might make is that it would be useful to the courts and counsel and to lay people considering, or involved in, an application under the *Wills Variation Act*. Several of our correspondents favoured this argument, and urged that such a list of orders be included in the *Wills Variation Act*. Upon reconsideration, and in the light of comment received on the Working Paper, we have concluded that British Columbia legislation should contain a list of orders that might be made under the Act.

Section 63 of the Ontario Act would serve as a useful model for legislative drafting although it should not be adopted in its entirety. Section 63 (2) (i) of the Ontario Act provides for reimbursing or indemnifying government bodies for benefits paid by them to dependants of the estate. We do not think dependant's relief legislation should serve this function. The Ontario section is relatively comprehensive. It omits only the making of a class order. It would appear, however, that subsections (2) (g)-(i) and (3) are either unnecessary or undesirable.

The Commission recommends that:

17. Section 3 of the Wills Variation Act *be revised by deleting from it* " . . . *may attach the conditions to the order that it thinks fit, or* . . ."

18. The Wills Variation Act *be revised to provide that:*
(1) The court may attach such conditions to an order as it thinks fit.
(2) Provision may be made out of income or capital or both.
(3) An order may be made
(a) for the benefit of an individual; or
(b) to a trustee on behalf of a defined class in which all members are ascertained.
(4) An order may provide for a lump sum payment, periodic payments by the purchase of an annuity or otherwise, or the transfer of specific property.

[278] Section 3.

(5) A lump sum may be held in trust and payments made from income or capital or both, as the court may direct.

(6) Periodic payments may be for an indefinite or limited period, or until the happening of a specified event.

(7) Specific property may be transferred to, or held in trust for the benefit of an applicant, absolutely, for life, for a term of years, or until the happening of a specified event.

(8) An order may be secured by a charge on property or otherwise.

11. Notice to Potential Applicants

Section 135 of the *Estate Administration Act* requires that notice of the intention to probate a will must be given to all applicants who might be entitled to apply under the *Wills Variation Act*. Widening the class of applicants may make this an onerous duty for a person applying for letters of administration or a grant of letters probate.

The New South Wales Law Reform Commission considered the question of notice to eligible persons. They said:[279]

> **3.3 Notice of proceedings: eligible persons.** We proposed in the Working Paper that Part 77 of the Supreme Court Rules, 1970, be amended so as to provide that notice of proceedings for provision must be given by the administrator of the estate of a deceased person to any surviving spouse and children of the deceased and to any person who is entitled to share in his estate. Many of our commentators would widen this proposal by requiring notice to be given to every person who is an eligible person within the meaning of section 6 (1) of the bill. While agreeing that it is desirable that all interested persons should get notice, there is a difficulty in the case of eligible persons. By force of section 9 (1) (a) of the bill, a person cannot be said to be an eligible person until the Court, in the proceedings for provision, makes a finding to that effect. Hence a requirement that notice be given to every eligible person could not be complied with. A requirement of this kind may need to refer to "a person who, in the opinion of the person giving the notice, may be an eligible person". If such a requirement were to be imposed, it would, we think, work well in most cases. This is so because most cases are concerned with the surviving spouse or a child of the deceased person and his status as such is usually a matter of common knowledge. An opinion that a person may be an eligible person would often be inescapable. On the other hand, an opinion that a person may be an eligible person because he satisfies the provisions of section 6 (1) (c) of the bill would not, in many cases, be easily formed. For this reason, we would require the administrator to give notice of proceedings for provision to a surviving spouse and a child of the deceased person and to any person, not being that spouse or child, who is entitled to share in the estate of the deceased and also to any other person who, in the opinion of the administrator, may be an eligible person. But, in addition, we would require every applicant for provision to give notice of his proceedings to any person, not being a surviving spouse or child of the deceased or a person entitled to share in the estate of the deceased, who, in the opinion of the applicant, may be an eligible person. If requirements of this kind were imposed, some person may get more than one notice of proceedings. This result is, however, better than the person concerned not getting any notice. We recognize, of course, that no procedure can guarantee that every eligible person will get a notice of proceedings in every case. Nonetheless, we think it desirable that an attempt be made, by rules of court, to improve the present position.

While we have tentatively concluded that amendments should be made to the notice requirements in order that persons eligible to apply will be aware of probate or administration proceedings, we have also concluded that this matter should be considered in the wider context of probate procedure. We intend to examine probate procedure in a subsequent portion of our general project on Wills and Succession.

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[279] *Supra*, n. 231, 107-8.

12. Contracting Out/Waiver

Whether parties should be able to contract out of the Act, ousting the jurisdiction of the court by agreement, depends upon what function the Act is to perform. The Act, in part, ensures that provision is made for dependants of the deceased who are in need. From its inception, the Act was designed to ensure that individuals recognized their support obligations so that the public was not required to shoulder the burden. In that respect, the Act protects a public interest. A person can usually waive statutory rights except where they protect a public interest.[280]

In favour of contracting out, it may be argued that it is important for the parties to determine their affairs. *Re Marquis Estate*,[281] mentioned earlier, is a good example. In that case, prior to marriage, the parties agreed that their separate estates would go to their respective children of earlier marriages. Each agreed not to claim against the estate of the other. In that case, however, the courts were giving effect to a contract to leave by will in favour of third parties. Ancillary to that agreement was the covenant not to claim under dependant's relief legislation. Under the current law, the courts will recognize contracts to leave by will, and assets conveyed by these contracts are not included in the estate for *Wills Variation Act* purposes. Such contracts, therefore, constitute an exception to the general rule that parties cannot waive statutory rights which protect a public interest.

We have concluded that the importance of providing adequate maintenance for dependants requires that the parties cannot oust the jurisdiction of the court to consider an application. The courts should consider any agreement as one of the factors weighed when determining whether adequate provision has been made for the applicant. That is the current law.

13. Wills for the Mentally Incompetent

In the Working Paper, we discussed whether the courts should have power to make, or revise, wills for persons who are mentally incompetent. That is a power which English courts currently enjoy, and could prove to be a useful tool both for providing for the family of a person who is mentally incompetent, and for estate planning. Our tentative conclusion was that British Columbia courts should not be granted such a power. In the light of comment received on that section, and following further consideration, we see no reason to depart from that conclusion. *Inter vivos* estate planning will answer many problems that could arise. Moreover, extending *Wills Variation Act* principles to intestacies will ensure the courts have adequate powers to review the circumstances in order to provide for members of the deceased's family. Concerns over a patient's peace of mind are minor when weighed against the possibility of a protracted struggle between potential successors to the patient, whose interests in the disposition of the patient's estate, during his lifetime, are negligible. During his lifetime, a patient's estate should be used for his well being. Power to determine *inter vivos* the disposition of a patient's estate upon his death does not really accomplish very much when those arrangements can be attacked after his death.

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[280] *Re Edwards Estate*, (1961-2) 36 W.W.R. 605 31 D.L.R. (2d) 308 (Alta. App. Div.).

[281] *Supra*, n. 221.

We have noted in the preceding chapters several problems which arise due to conflicts between succession legislation and the *Family Relations Act*. The *Family Relations Act* governs the disposition of marital property on marriage break-up. It vests in the spouses a *prima facie* one-half interest in family assets, and gives courts wide discretionary powers to divide assets fairly between the spouses. The surviving spouse, who has received an interest in family assets upon marital break-up, is already well protected under the *Family Relations Act*.

In this chapter we shall examine a number of issues involved in reconciling conflicts between succession and matrimonial property rights.

A. Reform Relating to the Family Relations Act

We received submissions which expressed concern over amending legislation governing other areas of the law, in order that it might conform to the provisions of the *Family Relations Act*. Our correspondents were concerned that problems encountered with that legislation were grave, and required urgent attention. It was suggested that amending succession legislation to take into account the provisions of the *Family Relations Act*, might impede reconsideration of that Act.

The proposals made in the Working Paper and the recommendations made later in this chapter, were formulated, not as an endorsement of the provisions of the *Family Relations Act*, but as necessary amendments to the law to prevent overlap between the rights of spouses. It is true that these problems arise in part because the *Family Relations Act* gives spouses rights to family assets in certain circumstances of marital break-up. Even apart from that Act, however, these problems may occur. Reform is desirable. Our recommendations are unlikely to impede review of the *Family Relations Act*.

Moreover, it is possible that the problems with the *Family Relations Act* noted by our correspondents, are not the result of the policy of that Act, but its novelty. It takes time for the courts to come to grips with new legislation, particularly where that legislation governs an area of the law in which disputes are common and bitter. Similar problems of transition occurred when the *Family Relations Act* was revised in 1972. One author[1] has observed that the courts were able to deal with that legislation, but it required a period of time in which the new approaches were tested and principles developed. It is reasonable to suppose that, similarly, the courts will be able to impose certainty upon the novel provisions of the current *Family Relations Act*, particularly those which govern entitlement to family assets.

B. Section 16 of the Wills Act

In order to prevent a former spouse from taking an interest in his or her former spouse's estate under the *Family Relations Act* and under the will of the deceased spouse, a new provision of the *Wills Act* was enacted. This provision, section 16, was proclaimed in effect on August 1, 1981. It provides that a gift to a surviving spouse whose marriage to the testator has been subject to an order of judicial separation, divorce, or nullity, is revoked, and the will takes effect as if the spouse had predeceased the testator. Section 16 of the *Wills Act* provides:

[1] Keith B. Farquar, "The New Matrimonial Property Legislation in British Columbia: The First Year," (1981) 15 U.B.C.L. Rev. 1.

Revocation of gift on dissolution

16. (1) Where in a will a testator

(a) gives an interest in property to his spouse;

(b) appoints his spouse executor or trustee; or

(c) confers a general or special power of appointment on his spouse,

and after the making of the will and before his death

(d) a judicial separation has been ordered in respect of his marriage;

(e) his marriage is terminated by a decree absolute of divorce; or

(f) his marriage is found to be void or declared a nullity by a court

then, unless a contrary intention appears in the will, the gift, appointment or power is revoked and the will takes effect as if the spouse had predeceased the testator.

(2) In subsection (1) "spouse" includes a person considered by the testator to be his spouse.

In Working Paper No. 28, entitled "The Making and Revocation of Wills," we identified a number of problems with this section. That discussion was not incorporated into our Report on The Making and Revocation of Wills as we thought it better to deal with the issue in the context of this project. The following discussion is based upon the points we raised in Working Paper No. 28.

1. Wills, Property, and Marriage Breakdown

Section 16 is very similar to subsection 17 (2) of the Ontario *Succession Law Reform Act*[2] and to section 17 of the *Uniform Wills Act*, all of which follow the recommendation made in 1973 by the New Zealand Property Law and Equity Reform Committee.[3] Rather than merely revoke a gift to a former spouse, the "will takes effect as if the spouse had predeceased the testator." This approach ensures that if the testator has designated an alternate beneficiary, in the event his spouse predeceases him, the gift to that beneficiary will be effective.

The section is intended to bring the law more into accord with contemporary expectations concerning the finality of property arrangements upon decree absolute of divorce or upon a decree of nullity.[4] It is unlikely that a divorced spouse would continue to wish to benefit his former spouse. Executing new wills is not always uppermost in the minds of spouses who have just separated or divorced. An unaltered will is unlikely to take into account changed circumstances. If an unaltered will is permitted to stand, it may give a spouse, who is already entitled to half the family assets, the other half.

The Manitoba Law Reform Commission considered the question of the revocation of wills upon divorce or annulment in the light of its proposals concerning a deferred matrimonial property sharing scheme similar to the current British Columbia position. It recommended that:[5]

> In case of dissolution or annulment of marriage, where a spouse's will executed prior to the divorce or annulment makes reference to, or confers any benefit upon, the other spouse, it shall be read as if the other spouse predeceased the testator or testatrix.

In our view, the fairness of permitting a surviving spouse to retain a gift or legacy, turns less upon the fact of divorce and more upon whether a property settlement has been made. If the divorce or other event which triggers the deemed lapse of the testamentary gift does not result in a property settlement, the surviving former spouse may receive nothing. Conversely, an injustice might also occur where an event results in a property settlement without triggering the deemed lapse.

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[2] R.S.O. 1980, c. 488.

[3] *The Effect of Divorce on Testate Succession*, (1973).

[4] *Report on the Impact of Divorce on Existing Wills*, (1977), at 2-3.

[5] *Report No. 24* (1976), at 135.

In principle we are opposed to revoking testamentary dispositions by operation of law, based upon the occurrence of an event which is independent of the arrangements the deceased actually made. Nevertheless, we believe that the provisions of the *Family Relations Act* relating to family assets raise significant problems which can only be resolved by revoking the testamentary gifts to the surviving spouse who has become entitled to an interest in family assets. Many, if not most, people are unaware of the significance of the *Family Relations Act* provisions relating to family assets. If the spouses have formally settled the distribution of property between themselves, it is likely that they will also revise their wills. The *Family Relations Act*, by operation of law, determines many questions respecting entitlement to family assets. The law must also, therefore, provide for the revocation of testamentary gifts from one spouse to the other, or else the surviving spouse, who is already entitled to a generous share of the estate, will become entitled to even more.

Similar policy decisions are taken into account in the American *Uniform Probate Code*. The *Uniform Probate Code* contains provisions designed to achieve results similar to those arising under section 16 of the *Wills Act*. Section 2-204 provides that a property settlement will deprive the surviving spouse of any right to take on an intestacy or under the deceased spouse's will:

> . . . [A] complete property settlement entered into after or in anticipation of separation or divorce is a waiver of all . . . benefits which would otherwise pass to [the surviving spouse] from the other by intestate succession or by virtue of the provisions of any will executed before the waiver or property settlement.

Section 2-508 provides that divorce or annulment will revoke a testamentary gift to the surviving spouse:

> If after executing a will the testator is divorced or his marriage annulled, the divorce or annulment revokes any disposition or appointment of property made by the will to the former spouse, any provision conferring a general or special power of appointment on the former spouse, and any nomination of the former spouse as executor, trustee, conservator, or guardian, unless the will expressly provides otherwise. Property prevented from passing to a former spouse because of revocation by divorce or annulment passes as if the former spouse failed to survive the decedent, and other provisions conferring some power or office on the former spouse are interpreted as if the spouse failed to survive the decedent. If provisions are revoked solely by this section, they are revived by the testator's remarriage to the former spouse. For purposes of this section, divorce or annulment means any divorce or annulment which would exclude the spouse as a surviving spouse within the meaning of Section 2-802(b). A decree of separation which does not terminate the status of husband and wife is not a divorce for purposes of this section. No change of circumstances other than as described in this section revokes a will.

The case of *Goldfield, Shore et al.* v. *Koslovsky*[6] indicates some of the problems that arise when the law does not revoke a testamentary gift to a spouse who has already received a property settlement. The parties entered into a separation agreement which provided for a disposition of property, and stipulated that they renounced all financial claims against each other "past, present, and future." The parties were subsequently divorced. The husband was a lawyer and, therefore, presumbably better placed than most testators to take into account the applicable law when providing for the distribution of his estate. The husband died leaving a will executed prior to the divorce. A substantial portion of his estate was left to his former wife. Mr. Justice Morse of the Manitoba Court of Queen's Bench held that the law was well settled that a gift in a will to a "wife" meant the woman who was the testator's wife at the time the will was made. The divorced spouse took under the will notwith-

[6] [1976] 2 W.W.R. 553 (Man. Q.B.); *see also Pleau* v. *Pleau*, (1980) 9 E.T.R. 43 (Quebec S.C.), and the annotation to that case; *Menrad* v. *Blowers*, (1982) 28 R.F.L. (2d) 289 (Man. Q.B.).

standing the purported exclusion of future rights under the separation agreement.

It is implicit in the judgment that a separation agreement can be drafted to exclude a divorced spouse from taking any benefit under the will, but that step will not always be taken. The parties may not address their minds to the issue. Where they do, it makes more sense merely to redraft the will. Not all separation agreements are drafted with legal advice. In fact, not all separation agreements are in writing: property may be informally divided.

Where there is no agreement between the parties respecting the division of matrimonial property, then the effect of the current British Columbia *Family Relations Act* is in issue. Part III of the *Family Relations Act* raises difficult questions on which there is little authority. It seems relatively clear that section 43 is intended to vest in each spouse an immediate half interest in family assets as a tenant in common. Section 51 of the *Family Relations Act*, however, permits a judge of the Supreme Court to reapportion that division of assets having regard to the actual position of the parties to the marriage. A number of factors are listed:

> **Judicial reapportionment on the basis of fairness**
>
> **51.** Where the provisions for division of property between spouses under section 43 or their marriage agreement, as the case may be, would be unfair having regard to
>
> (a) the duration of the marriage;
> (b) the duration of the period during which the spouses have lived separate and apart;
> (c) the date when property was acquired or disposed of;
> (d) the extent to which property was acquired by one spouse through inheritance or gift;
> (e) the needs of each spouse to become or remain economically independent and self-sufficient;
> (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property, or the capacity or liabilities of a spouse,
>
> the Supreme Court, on application may order that the property covered by section 43 or the marriage agreement, as the case may be, be divided into shares fixed by the court. Additionally or alternatively the court may order that other property not covered by section 43 or the marriage agreement, as the case may be, of one spouse be vested in the other spouse.

In deciding whether equal division under section 43 should be varied, the court may only have regard to the considerations set out in section 51.[7]

The language used in the Act suggests that there is an immediate vesting of a right in the family assets in each spouse, subject only to the possibility that the *prima facie* right to half the family assets might be displaced at a later date by an order under section 51 on the ground that the 50-50 split is unfair.

Section 16 of the *Wills Act* specifies four events which trigger a deemed lapse: an order of judicial separation, a decree absolute of divorce, a finding that the marriage is void, or a decree of nullity. Section 43 of the *Family Relations Act* lists five "triggering" events which will vest in each spouse an interest in family assets: a separation agreement, a declaratory judgment under section 44 of the Act, an order for dissolution of the marriage, an order for judicial separation, and an order declaring the marriage null and void.

The divergence between the wording of section 16 of the *Wills Act* and section 43 of the *Family Relations Act* is unfortunate. While the two sections correspond in respect of judicial separations, with regard to divorce, section 16 speaks of "an order absolute," while section 43 speaks of "an order for

[7] *Girard v. Girard*, (1983) 42 B.C.L.R. 305. (B.C.C.A.).

dissolution of marriage," An order absolute is undoubtedly an order for the dissolution of the marriage. The vesting of an immediate right to half the family assets and the revocation of the testamentary gift would occur simultaneously. However, under section 43 (1) (d) of the *Family Relations Act* the right or interest in marital property vests upon "an order declaring the marriage null and void," while under section 16 (1) (f) of the *Wills Act* a will is revoked by the "finding" that a marriage is void or the declaration thereof. There may in fact be some time lapse between the finding of nullity and the making of the order. Within that time the deemed lapse provision would be operative and the surviving spouse treated as if he or she had predeceased the testator, without any offsetting rights in marital property having vested. Moreover, the courts may "find" that a marriage is null and void in many circumstances where an order declaring the marriage null and void will not necessarily follow. For example, in an application to determine legitimacy, the courts may "find" that the marriage of the applicant's parents was null and void. The *Wills Act* deemed lapse provision would operate, while no *Family Relations Act* rights in marital property would vest. The *Uniform Wills Act* provision guards against this event by providing that the testator must be a party to the proceeding in which his marriage is found to be null and void.

The converse situation (i.e., where there is a property settlement but the will remains in force in respect of the surviving spouse) could also arise. A separation agreement is effective to vest a half interest in family assets in a spouse but not to revoke the gift to that spouse made in a will. Similarly, an order *nisi* is an order for the dissolution of a marriage. It is not, however, an order absolute and would not trigger a deemed lapse of a testamentary gift.[8] In either event a surviving spouse would be entitled to rights to family property under the *Family Relations Act* and to succession under the will.

In many cases the injustice section 16 is designed to cure would continue to exist because of the divergence in language between section 16 and section 43. We feel that consistency and fairness favour following the policy behind the *Family Relations Act*. While this does not constitute an endorsement of the scheme of the *Family Relations Act*, or of its drafting, it does recognize the reality of its enactment and attempts to bring the *Wills Act* into harmony with it.

The following points might be noted:

(1) Part III of the *Family Relations Act* was intended to bring about a fair distribution of matrimonial property. Therefore, after a division of matrimonial property, a testator would likely change his will with respect to gifts to his spouse.

(2) Where a will is not revoked by a testator, after a division of marital property, the failure to revoke is probably the result of inadvertence rather than a conscious desire to retain the will.

(3) Treating the surviving spouse as having predeceased the testator where there has been a property settlement causes less injustice to testators than leaving the will in place. Many testators are lax, careless, or uninformed about the effect of their wills.

(4) The divergence between section 16 of the *Wills Act* and section 43 of the *Family Relations Act* can result in a surviving spouse being entitled, by virtue of the will, to a share in the assets of the other spouse greater than a fair share as defined in section 43 of the *Family Relations Act*. Equally, it may result in a spouse

[8] *See, e.g., Re Kindl*, (1982) 13 E.T.R. 101 (Ont. H.C.).

being entitled to neither a share in the other spouse's estate under his will nor an interest in family assets under the *Family Relations Act*.

We feel that the two Acts can best be reconciled by providing that a gift to a spouse in a will, made before one of the triggering events described in section 43, is revoked if entitlement to an interest in family assets arises under the *Family Relations Act*.

2. Reconciliation

The problems which arise because of the discrepancies in wording between section 43 and section 16 are further complicated by the failure of the *Family Relations Act* to deal with the effect of reconciliation or remarriage on matrimonial property rights. As that Act currently stands, it would appear that a *prima facie* half interest in family assets would survive reconciliation or remarriage.[9] Under section 16, the surviving spouse would be unable to take under the will, notwithstanding that there had been a reconciliation and the marriage was subsisting at the date of the testator's death. The surviving spouse would continue to be entitled to a half interest in family assets, but would be deprived of any legacy of non-family assets or property acquired after the reconciliation or remarriage. It is also important to realize that a one-half interest in property, belonging to the surviving spouse, vested in the testator at the time of the earlier marriage breakdown. This one-half interest in the surviving spouse's property would form part of the testator's estate and benefit his heirs to the exclusion of the surviving spouse.

In Working Paper No. 28, The Making and Revocation of Wills, we tentatively proposed that section 16 should be amended to provide that revocation of a testamentary gift by a deceased to the surviving spouse should take place only if the surviving spouse has become entitled to an interest in family assets. We proposed that, if there was a reconciliation before the death of one spouse, the surviving spouse might elect between rights to succession and rights under the *Family Relations Act*.

Our proposal respecting reconciliation was designed to protect both the surviving spouse and the estate of the deceased spouse. Requiring an election insured that the surviving spouse would receive at least the amount that would have been received had the parties never separated. It also prevented the surviving spouse from receiving more than would have been received had the parties never separated.

This approach involves a complicated statutory provision. While initially attracted to this answer, we are reluctant to propose so complex a response to what is probably a very rare problem. Further, this approach distinguishes between a spouse who has reconciled, and one who has never separated from the deceased. In our opinion, there is no reason to make this distinction. Upon reconciliation, the rights of spouses should be the same as if they had never separated.

While we have concluded that after reconciliation, for the purposes of succession, the surviving spouse should be treated as if there had been no marital break-up, we think that this is impossible to accomplish in view of the provisions of the *Family Relations Act*. In order to protect possible third party

[9] In *Bailey* v. *Bailey*, (1982) 26 R.F.L. (2d) 209, 37 O.R.(2d) 117 (Ont. C.A.), the wife's application had been struck as disclosing no reasonable cause of action having regard to the separation agreement. The Ontario Act does not address the issue of the effect of reconciliation. It was held by the Ontario Court of Appeal that whether reconciliation terminated a separation agreement was a triable fact; *see also*, *Re Kolbe*, (Unreported B.C.S.C. decision, Feb. 12, 1982, per. McTaggart L.J.S.C.), (1982) 13 A.C.W.S. (2d) 190; [1982] B.C.D. Civ. 4171-01; *Britney* v. *Britney*, (Unreported B.C.S.C. decision) May 11, 1982, Vict. Reg. No. 08980, *per* Tyrwhitt-Drake L.J.S.C., B.C. Recent Decisions, Vol. II, No. 37, June 3, 1982.

interests, entitlement to family assets should continue after reconciliation. In order to treat a reconciled spouse as if there had been no marital break-up, it would be necessary to provide that succession rights govern the surviving spouse's entitlement in the deceased's estate, and not rights that may have arisen under the *Family Relations Act*. One possible solution is to provide that revocation of a testamentary gift does not occur until the testator's death, and that reconciliation, while not terminating *Family Relations Act* rights, will prevent the surviving spouse from asserting these rights. Not only is that approach conceptually difficult, it is also too complex a response to this problem.

We have concluded that it is impossible, given the provisions of the *Family Relations Act*, to restore the status of a separated spouse who reconciles with, or a former spouse who remarries, the deceased, so that it is the same as if there had been no marital break-up. We think, however, that if the spouses have reconciled by the time that one of them dies, there is no longer a need to revoke succession rights to prevent the surviving spouse receiving too much. In the event of reconciliation or remarriage at the time of the deceased's death, section 16 should have no effect. In most cases the surviving spouse would be entitled, by virtue of rights to family assets and rights to succession, to the bulk of the estate. Notwithstanding that the nature of the rights asserted by a surviving spouse who has reconciled with the deceased, and those possessed by a surviving spouse whose marriage to the deceased never broke down, are different, the result in most cases will be the same.

In our Working Paper on The Making and Revocation of Wills we observed that, if entitlement to family assets was revoked upon reconciliation, it was conceivable that "a tangled web of legal and equitable interests in property may arise where the parties reconcile and separate several times." Upon further reflection we think this is not a real danger. Entitlement under the *Family Relations Act* does not arise upon separation alone (although it has not been satisfactorily resolved whether an oral separation agreement, which would trigger entitlement to family assets, might arise, expressly or implicitly from separation alone). For entitlement to arise, one of several events, including the making of a separation agreement, must occur. Therefore, in order for a "tangled web" to arise, one would need spouses to embark upon, for example a cycle of reconciliations and separation agreements, an unlikely occurrence. Even more unlikely is a series of marriages and divorces between the same spouses. The only real problem that arises upon reconciliation is that the *Family Relations Act* rights do not terminate. But upon reconciliation, since current morality is to give the surviving spouse a generous share of the estate on succession, it is likely, though by no means certain, that that is what the deceased would have intended.

3. Estates Pur Autre Vie

Section 16, as drafted, presents an additional problem. While uncommon, it is possible to make a testamentary gift to a beneficiary for a period of time based on the life of the surviving spouse. This is known as a gift *pur autre vie*. Section 16 provides, in certain events, that the surviving spouse is deemed to predecease the testator. Suppose the testator makes a gift "to A for the lifetime of my spouse." Conceivably, if section 16 operates, deeming the surviving spouse to predecease the testator will terminate the gift to A, a consequence unintended by the Legislature. To guard against this possibility, section 16 should be amended to provide that it does not affect a gift to someone other than the spouse.

4. Recommendation

The Commission recommends:

19. That section 16 be amended, in language comparable to the following, to provide:

16. (1) Where in a will a testator:

(a) gives an interest in property to his spouse,

(b) appoints his spouse executor or trustee, or

(c) confers a general or special power of appointment on his spouse and after the making of the will a property division has been made by the testator in favour of the other spouse, or the other spouse becomes entitled to an interest in family assets under the Family Relations Act, *R.S.B.C. 1979, c. 20, subject to a contrary intention contained in the will or an instrument respecting matrimonial property interests, the will takes effect as if the spouse had predeceased the testator.*

(2) In this section "spouse" includes a person whose marriage to the testator was terminated or declared a nullity.

(3) In this section, "a property division" is an arrangement between the spouses concerning the division of their property which is intended by them, or appears to have been intended by them, to separate and finalize their affairs, in recognition of their marital break-up.

(4) Subsection (1) does not apply to a spouse who reconciled with the testator, if the reconciliation was subsisting at the time of the testator's death.

(5) This section does not prohibit an application by the surviving spouse under the Wills Variation Act.

(6) This section does not apply to testamentary gifts to a beneficiary other than the spouse of a limited estate based upon the life of the spouse.

Several changes have been made to this recommendation since its first circulation in The Making and Revocation of Wills. First, the surviving spouse, in the event of reconciliation, is not required to elect between rights to succession and rights under the *Family Relations Act*. Reconciliation will "revive" the surviving spouse's interests granted under the will. Second, a property division made by the deceased in favour of the surviving spouse will also cause the gift to the surviving spouse to be revoked. A property division, as defined, is one which has been designed to finalize the affairs between the spouses. Letting the gift to the surviving spouse continue after a property settlement has been made will, in most cases, result in giving the surviving spouse too much. Moreover, in many cases, rather than rely upon entitlement to family assets under the *Family Relations Act*, the spouses will make formal arrangements concerning the division of their property. There is no functional difference between statutory entitlement to family assets and consensual division of property, beyond that in the latter case the parties should have directed their minds to revising their wills.[10] Even when the parties agree upon the division of their property, however, it appears that it is a common error to fail to revise their wills. In either case, therefore, the gift to the surviving spouse, subject to a contrary intention, should lapse.

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[10] In California, for example, legislation has been enacted which revokes a testamentary gift to a spouse only where testator and spouse, after marriage dissolution, enter into a "property settlement agreement waiving and renouncing all rights to inherit the estate of the other at the other's death:" (Calif. Statutes, 1980, c. 1188, adding s. 80 to the *Probate Code*). Section 4352 of the California Civil Code requires every final judgment declaring a marriage a nullity or dissolving a marriage shall contain the following notice: (NOTICE: Please review your will. Unless a provision is made in the property settlement agreement, this court proceeding does not affect your will and the ability of your former spouse to take under it.)

We have also considered an additional refinement to the events which should revoke a gift to a spouse: should a division of matrimonial property arising by operation of law in another jurisdiction affect a surviving spouse's entitlement under a will? For example, under Ontario legislation spouses might become entitled to an interest in family assets. The husband, who never revises his will, moves to British Columbia where he lives until his death. Should the gift to his wife lapse? There is no functional difference between rights arising under our *Family Relations Act* and the legislation of other provinces respecting matrimonial property. Our conclusion is that statutory entitlement to an interest in family assets arising upon marital break-up, in whatever jurisdiction it occurs, should revoke a testamentary gift to the surviving spouse. One means of accomplishing that is to substitute the following for the draft section 16 (3):

> (3) In this section, a "property division" means an arrangement to separate and finalize the affairs of spouses by determining rights to matrimonial property made in recognition of marital break-up that arises
>
> (a) by operation of law of another jurisdiction, including the operation of legislation respecting the division of matrimonial property, or
>
> (b) by agreement of the spouses.

We are concerned, however, that this refinement will cause too many problems. Even across Canada there are marked differences between the provinces respecting division of matrimonial property. In some provinces, for example, death is an event that triggers entitlement to family assets. Those provinces provide the surviving spouse with overlapping rights to succession and to family property. It cannot be fair, in such a case, to revoke the spouse's entitlement under the deceased's will. Moreover, when one considers jurisdictions which have a regime of full community of property, it becomes clear that any legislation which will accomplish our desired goals must be very complicated. For example, a testamentary gift, merely because of a division of an inconsequential portion of matrimonial property, should not be revoked. And yet to ensure that will not happen would require a complex response not warranted by the small problem we are attempting to resolve. One solution might be to provide that only the law of a spouse's domicile applies, and not the law of the situs of their property. Our conclusion, in any event, is that this is a problem which must be left to be resolved by the principles of private international law.

Third, subsection (6) of the recommendation is designed to protect gifts given to someone other than the spouse of a limited estate which is based upon the life of the spouse (gifts *pur autre vie*).

Fourth, the section is now "subject to a contrary intention contained in the will or an instrument respecting matrimonial property interests." Section 16 should apply unless specifically excluded. It is not uncommon for one spouse to agree, in a separation agreement or other instrument prepared to settle the affairs of spouses upon marital breakdown, to make provision by will for another spouse. Section 16 should have no effect when the spouses have directed their minds to the division of matrimonial property and agreed to distribute part of it by will. Section 16 should apply subject only to a contrary intention evidenced by the will or by an instrument respecting matrimonial property rights or interests.

The draft section has also been amended by deleting the phrase ". . . the gift, appointment or power is revoked and . . ." The inclusion of that phrase resulted in revoking a gift to a spouse as well as having it lapse.

Although technically different, there would not appear to be any circumstances in this case, where revocation or lapse would achieve inconsistent results. Nevertheless, there is no reason to include this technical inconsistency in the draft section.

The recommended draft of section 16, like the current section 16, causes a general or a special power of appointment to lapse. In some cases a revocation of a power of appointment may prejudice only third parties. A general power of appointment is a power to appoint anyone, including the donee of the power, to receive property. A special power of appointment is one in which the class of potential donees is restricted, although it may also include the donee of the power.[11]

If the special power of appointment may be exercised in favour of the surviving spouse, it differs little from an actual gift. In the event of marriage break-up it should be revoked. When a special power of appointment can not be exercised in favour of the surviving spouse, revoking it will only work to the disadvantage of other potential beneficiaries. It would not prevent the surviving spouse from receiving too great a share of the deceased's estate by virtue of overlapping, inconsistent rights.

An alternative to revoking a power of appointment granted to the spouse is to provide that it continues in effect but may not be exercised in his or her favour. Another approach would be to revoke only powers of appointment which might be exercised in favour of the surviving spouse. Either of these options may be drafted to exclude the surviving spouse from the class of potential donees in whose favour a power of appointment granted to someone other than the surviving spouse might be exercised.

While it is possible to prevent a surviving spouse from benefiting from a power of appointment, we are not convinced that a gift of a power of appointment to the spouse should survive marriage break-up. First, circumscribing the class from which appointees may be selected by removing the surviving spouse may significantly alter the power of appointment, so that it could not be used to accomplish functions contemplated by the testator. For example, the testator's real wish may have been to provide for his children. When he made his will, he anticipated that at his, and later, his spouse's, death, his children might still be infants. Rather than benefit his children directly, or set up a trust in their favour, he gave his spouse a power of appointment, anticipating that the spouse would exercise it in her own favour, and use the property for the benefit of the children. The children may not even be included in the class of potential donees. Second, the donee of the power of appointment is selected by the testator as one whom he can rely upon and trust to exercise the power fairly. Marriage break-up may be so bitter as to remove any and all reason to trust the surviving spouse. We recognize that revoking a general or special power of appointment may prejudice interests other than those of the surviving spouse. However, we have concluded that, on balance, the safest course is to revoke such a power of appointment. Similar reasons certainly must underly the Legislature's decision to revoke an appointment of a spouse as executor or trustee. A position of trust should not be occupied by one whom the testator probably ceased to trust.

With respect to a power of appointment granted to someone other than the surviving spouse, but in whose favour it might be exercised, we have concluded that no reform is necessary. The primary purpose of section 16 is to guard against events no longer intended by the deceased. A power of appoint-

[11] *See* Waters, *Law of Trusts in Canada*, (1974), at 399.

ment granted to someone other than the surviving spouse is subject to the discretion of the person who is given the power. The deceased trusted that person, a friend perhaps of the spouse, to exercise the power wisely and with reference to circumstances prevailing after the deceased's demise. In some cirumstances, perhaps, that power of appointment should be exercised in favour of the surviving spouse. In any event, there is little justification for fettering by arbitrary rule the discretion of someone other than the surviving spouse who is given a power of appointment.

A related issue is whether a guardianship appointment in favour of the surviving spouse should be revoked. Section 2-508 of the U.S. *Uniform Probate Code* revokes a nomination of the former spouse as guardian, unless the will expressly provides otherwise. We are of the view such a provision is not necessary. In the event the surviving spouse should not have guardianship, this is something that could be corrected by court order under the *Family Relations Act*.

Lastly, a surviving spouse may still apply under the *Wills Variation Act*. In most cases, however, the surviving spouse, while eligible to apply, will not be entitled to a share of the estate. Nevertheless, the courts should have jurisdiction to consider that issue, since a division of matrimonial property does not guarantee that the surviving spouse has been adequately provided for.[12]

5. Transition

The current section 16 of the *Wills Act* came into force on August 1, 1981. At that time, no specific provision was made respecting its transition or application. The general application provision of the *Wills Act*, section 46 (1), provides that the Act applies only to wills made after March 31, 1960. There was some doubt whether this section governed section 16.[13]

Section 46 has recently been amended to provide as follows:[14]

> **46.** (3) Section 16 applies to a will made before, on or after March 31, 1960.

Consequently, section 16 applies to a will whenever made. The section does not address the question, however, of whether it applies to judicial separation, decree absolute of divorce or declaration of nullity occurring before, on or after March 31, 1960. Does the section apply to a will made in 1945 where the testator and his spouse divorce in 1950? Or does it only apply where marital breakdown occurred after the section came into force?

This issue was recently considered in *Re Matejka*.[15] The testator's will was made subsequent to March 31, 1960. The divorce occurred before section 16 was proclaimed. It was held that section 16 was inapplicable. In our opinion, this result is desirable. When the will is made is insignificant. The section should apply to any will whenever made, provided it only operates if entitlement to family assets arises after its proclamation. In any event, the recommendations we have made to amend section 16 have the effect of building in an application provision. The section will only apply if there has been a property division, or entitlement to family assets under the *Family Relations Act* has arisen. If there has been a consensual property division, there is no limit on the section's retroactivity. In the latter case the section is

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[12] *See, e.g., Re Lampert and Lampert*, (1983) 20 A.C.W.S. (2d) 499 (Alta. Q.B.); *Marusyn* v. *Prill*, (1983) 20 A.C.W.S. (2d) 439 (B.C.C.A.).

[13] The April 27, 1982, minutes of the B.C. Wills and Trusts Subsection of the Canadian Bar Association, notes the case of *Re Grant Estate*, an unreported decision of Mr. Justice Vanderhoop, April 1982 in which it was held that section 46 of the *Wills Act* governed section 16.

[14] S.B.C. 1982, c. 46, s. 48.

[15] (1983) 43 B.C.L.R. 382 (B.C.S.C.).

limited by the *Family Relations Act* and its transition provisions. That Act came into force in 1978. Section 83 of that Act provides that for various "triggering events" the *Family Relations Act*, 1972 still applies. Section 84 of the current *Family Relations Act* provides that the "Act is retrospective to the extent necessary to give effect to its provisions." Consequently, some questions concerning the retroactivity of the current *Family Relations Act* remain to be resolved.[16]

C. Position of Separated Spouse Under Intestate Succession and the Wills Variation Act

When we first proposed amendments to section 16 of the *Wills Act* we did not take into account the problem that arises if there is an intestacy or a partial intestacy. Under section 16, once the former spouse acquires an interest in family assets, the right to take under the will is revoked. The will takes effect as if the former spouse had predeceased the testator.

A revoked gift will fall into the residue of the estate and pass under the general gift of residue. If there is no general gift of residue, or if it is ineffective to convey the former spouse's revoked interest, or the general gift of residue is revoked, there will be a partial intestacy. A divorced spouse will not receive anything if the deceased former spouse dies intestate. A separated spouse is entitled to succeed on an intestacy subject to section 111 of the *Estate Administration Act*. To prevent a separated spouse from being benefitted twice, under the *Family Relations Act* by virtue of an interest in family assets, and under intestate succession, the *Estate Administration Act* should be amended.

One of our correspondents suggested that a provision similar to section 16 respecting intestate succession should be enacted:

> The suggested changes where there has been a division of family assets under the Family Relations Act, but the spouses remain married, have the potential to be more difficult from the standpoint of administering the Estate. Where spouses have divorced or obtained a judicial separation, accompanied by a division of family property where all the necessary transfers have been completed, the administration of the Estate of either one is quite simple, provided the deceased has a Will. If the deceased died intestate, or if some but not all the property transfers had been completed, or if the parties reconciled, it is more difficult to foresee an orderly administration of the Estate where the administrator or executor could distribute the Estate without fear of adverse claims. The working paper gives no indication of whether a separated but not divorced spouse is deemed to be surviving or predeceased in the case of an intestacy. If the spouses had separated under a judicial separation, they could well remain spouses for the purposes of intestate succession, thereby giving the separated spouse the benefits under the Family Relations Act, and under the Intestate Succession Rules. A provision similar to the new Section [16] relating to Intestacies, would be beneficial.

This was a matter we had deferred to this project. We agree with the suggestion of our correspondent. A separated spouse, entitled to an interest in family assets, should be barred from taking under intestate succession.

We made no recommendation with respect to the bar against a separated spouse sharing on an intestacy after having been separated from the deceased for one year or more. The function of that provision is to disinherit a surviving separated spouse on an intestacy when it is unlikely, had the deceased lived,

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[16] On the application of the *Family Relations Act*, *see Mitchell* v. *Mitchell*, (1981) 21 R.F.L. (2d) 179 (B.C.S.C.) *aff'd*. (1982) 26 R.F.L. (2d) 97, 33 B.C.L.R. 106, (B.C.C.A.); *Newson* v. *Newson*, (1981) 1 W.W.R. 285, 25 B.C.L.R. 231 (B.C.S.C.) *aff'd*. [1982] 4 W.W.R. 478 (B.C.C.A.); *Pearce* v. *Pearce*, (1975) 18 R.F.L. 302, [1975] 2 W.W.R. 678, 52 D.L.R. (3d) 544 (B.C.S.C.); *Pearce* v. *Pearce*, (1975) 20 R.F.L. 196, [1975] 4 W.W.R. 531 (B.C.S.C.); *Vedovato* v. *Vedovato*, (1982) 25 R.F.L. (2d) 297 (B.C.C.A.); *Martelli* v. *Martelli*, (1982) 33 B.C.L.R. 145, 26 R.F.L. (2d) 1 (B.C.C.A.); *Rutherford* v. *Rutherford*, (1981) 30 B.C.L.R. 145, [1981] 6 W.W.R. 485, 23 R.F.L. (2d) 337 (B.C.C.A.).

they would have reconciled. The section serves to finalize the affairs of separated spouses.

By way of contrast, the *Uniform Intestate Succession Act* does not disqualify a surviving spouse by reason of separation only. Under section 17 of the Uniform Act, the surviving spouse takes no part of the deceased spouse's estate if he or she is living in adultery at the time of the deceased's death. The Newfoundland *Intestate Succession Act*[17] is patterned after the Uniform Act. In a recent case, *Re Mullins*,[18] the Newfoundland Supreme Court interpreted this section. The wife of the deceased intestate had left her husband in 1934 at his request. She had lived in a common law relationship with another man until shortly before the deceased's death. It was held that, because the widow was not living in an adulterous relationship at the time of the deceased's death, she was entitled to share in the intestacy. Clearly, disqualification based upon adultery serves a very limited function. The British Columbia Act contained a similar provision until 1972.[19] That section was repealed and replaced with the current section 111.

The policy promoted by section 111 should be considered in the light of the recommendations we have made with respect to reconciling spousal rights to succession and to family property. Earlier, we concluded that a property settlement in favour of a separated or former spouse, or entitlement to family assets, should be the significant factor in determining whether a separated or former spouse should continue to enjoy rights of succession respecting the deceased spouse's estate. Under the *Estate Administration Act* a divorced spouse, or a "spouse" of a void marriage, does not share in the intestacy of the deceased. Presumably in these events the surviving former spouse is excluded because the circumstances of each case will tend to be unique, and division of property between the spouses should be by agreement or court order.

Section 111 of the *Estate Administration Act* recognizes that the position of a surviving separated spouse differs from that of a former spouse. Spousal separation may be temporary or permanent, and since a decision to separate may be emotionally made, often the spouses will be unsure whether it is irrevocable or momentary. There will come a time, however, when the prospect of reconciliation becomes unlikely. Section 111 sets this time at one year from the initial separation. After one year the position of a surviving separated spouse is equated with that of a former spouse.

It is unnecessary to rely upon an arbitrarily chosen time to determine the rights of a surviving separated spouse on the intestate death of the other spouse. If entitlement to family assets under the *Family Relations Act* does not arise, or no property settlement is made, the surviving separated spouse should be entitled to share on an intestacy. If entitlement to family assets under the *Family Relations Act* does arise, or a complete property settlement is made in the spouse's favour, the surviving spouse should not be entitled to share on the intestacy. It follows that section 111 should be deleted from the *Estate Administration Act*. The recommendations we made respecting the *Wills Variation Act* would extend the courts' jurisdiction under that Act to make an order for a separated spouse from the estate of an intestate, governed by the same principles which determine adequate provision for the family or dependants of the deceased.

Whether a property settlement has been made should determine whether the surviving spouse is entitled to succession rights. Where the parties have

[17] R.S. Nfld., 1970, c. 183, s. 18.

[18] (1981) 9 E.T.R. 167 (Nfld. S.C.).

[19] S.B.C. 1972, c. 3, s. 4; *See, e.g., Burns* v. *Burns*, [1938] 4 D.L.R. 513, [1938] 3 W.W.R. 477 (P.C.); *Re Hanson*, (1971) 3 N.B.R. (2d) 768.

somehow separated without bringing themselves within the property sharing arrangements under the *Family Relations Act*, it follows that the will should continue to be effective. Similarly, entitlement to succeed on an intestacy should depend upon whether a property settlement has been made, or rights to family assets have arisen.

The Commission recommends:

20. (1) That section 111 of the Estate Administration Act *be repealed.*

(2) That the Estate Administration Act *be amended to provide, in language comparable to the following, that:*

- *(a) Subject to a contrary intention contained in an instrument respecting matrimonial property interests, if before the death of a spouse, a surviving spouse becomes entitled to an interest in family assets under the* Family Relations Act, *or the deceased has made a property division in favour of the surviving spouse, in the event of an intestacy, the deceased's estate be distributed as if the surviving spouse predeceased the deceased.*
- *(b) In subsection 2 (a), "a property division" is an arrangement between the spouses concerning the division of their property which is intended by them, or appears to have been intended by them, to separate and finalize their affairs, in recognition of their marital break-up.*
- *(c) Subsection 2 (a) does not apply to a spouse who reconciled with the deceased, if the reconciliation was subsisting at the time of the deceased's death.*
- *(d) This section does not prohibit an application by the surviving spouse under the* Wills Variation Act.

An ancillary issue arises from preventing a separated spouse from sharing in the deceased's estate under section 16 of the *Wills Act*, and under our Recommendations 19 and 20. Currently, under section 6 of the *Estate Administration Act* the surviving spouse may apply for a grant of administration when the deceased spouse dies intestate, or the executor named in the will refuses to act.

The right to apply for a grant of administration is based upon the spouse having some interest in the deceased's estate. It should follow from depriving the surviving spouse of that interest that he or she should not be entitled to a grant of administration. The court's power to grant administration is discretionary.[20] It is unlikely a court would grant administration to a surviving separated spouse whose rights of succession from the deceased spouse have been revoked. Whether legislation should specifically bar such a spouse's entitlement to a grant of administration is a subject we hope to examine in our intended project on probate procedure.

D. Death of One Spouse and Judicial Reapportionment of Property Division

To summarize the effect of our recommendations respecting separated and divorced spouses, and "spouses" of void marriages, if a final property settlement is made in favour of such a spouse or entitlement to family assets under the *Family Relations Act* has arisen, he or she is barred from sharing in the deceased spouse's estate, either by will or on an intestacy. An exception is made if there has been a reconciliation or remarriage.

[20] *Estate Administration Act*, s. 6 and s. 7; *see, e.g., Jacobson v. Huber*, (Unreported B.C.S.C. decision, Van., Apr. 8, 1982, *per* Esson J.) (1982) 7 B.C.D. Weekly Headnotes, [1982] B.C.D. Civ. 4155-02.

A separated or former spouse barred from taking under the deceased spouse's will or on an intestacy must rely upon rights flowing from agreement of the parties, or entitlement under the *Family Relations Act*. There may be cases where such a spouse does not possess adequate means for his or her maintenance and support. The agreement between the parties may have been inadequate or unfair. Similarly, entitlement to family assets under the *Family Relations Act* may be insufficient for the spouse's needs, or represent an unfair share. If both spouses are alive, the courts possess jurisdiction under the *Family Relations Act* to reapportion the *prima facie* entitlement to a one-half share in family assets as a tenant-in-common, or any division of property arranged by the spouses by marriage agreement.[21] The courts also possess jurisdiction under the *Family Relations Act* to vary a division of property made by post-nuptial or ante-nuptial settlement.[22] There is some doubt as to the courts' jurisdiction to vary a division of property after one spouse has died.

The court's power to reapportion a division of property under section 43 of the *Family Relations Act* or by marriage agreement, is contained in section 51. We discussed the general effect of section 51 earlier. For the sake of convenience, we reproduce that section:

> **Judicial reapportionment on basis of fairness**
>
> **51.** Where the provisions for division of property between spouses under section 43 or their marriage agreement, as the case may be, would be unfair having regard to
>
> (a) the duration of the marriage;
> (b) the duration of the period during which the spouses have lived separate and apart;
> (c) the date when property was acquired or disposed of;
> (d) the extent to which property was acquired by one spouse through inheritance or gift;
> (e) the needs of each spouse to become or remain economically independent and self sufficient;
> (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,
>
> the Supreme Court, on application, may order that the property covered by section 43 or the marriage agreement, as the case may be, be divided into shares fixed by the court. Additionally or alternatively the court may order that other property not covered by section 43 or the marriage agreement, as the case may be, of one spouse be vested in the other spouse.

"Marriage agreement" is defined in section 48 of the *Family Relations Act*. The relevant provisions of section 48 are as follows:

> **Marriage agreements**
>
> **48.** (1) This section defines marriage agreement for the purposes of this Part and this definition applies to marriages entered into, marriage agreements made and to property of a spouse acquired before or after this section comes into force.
>
> (2) A marriage agreement is an agreement entered into by a man and a woman prior to or during their marriage to each other to take effect on the date of their marriage or on the execution of the agreement, whichever is later, for
>
> (a) management of family assets or other property during marriage; or
> (b) ownership in, or division of, family assets or other property during marriage or on the making of an order for dissolution of marriage, judicial separation or a declaration of nullity of marriage.
>
> (3) A marriage agreement, or an amendment or rescission of a marriage agreement, must be in writing, signed by both spouses, and witnessed by one or more other persons.

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[21] Section 51; the distinction between family assets and business assets appears to have become blurred in recent decisions. In *Van Daele* v. *Van Daele (No. 1)*, (Unreported B.C.S.C. decision, Feb. 25, 1982, *per* Meredith J.) (1982) 13 A.C.W.S. (2d) 261, the wife's decision to allow her husband to use part of his income, which otherwise would have been devoted to family purposes, for the acquisition of shares, entitled her to a 50% interest in those shares.

[22] Section 54.

(4) Except as provided in this Part, where a marriage agreement is made in compliance with subsection (3), the terms described by subsection (2) (a) and (b) are binding between the spouses whether or not there is valuable consideration for the marriage agreement.

A separation agreement falling within the definition in section 48 (2) and (3) would be a "marriage agreement" for the purposes of section 51.[23] In other provinces[24] the courts may not review a separation agreement, other than for fraud, duress, undue influence or unconscionability.[25] British Columbia courts possess discretion to vary the terms of a "marriage agreement" which is "unfair,"[26] even if there was no undue influence, or that the party seeking to vary the agreement had obtained independent legal advice.[27] Additionally, courts may vary the *prima facie* entitlement of each spouse to an undivided one-half interest in family assets.

Section 54 of the *Family Relations Act* provides that a court may vary the terms of a "marriage settlement:"

Variation of marriage settlements

54. (1) This section applies to an ante nuptial or post nuptial settlement that is not a marriage agreement under this Part.

(2) The Supreme Court may, on application, not more than 2 years after an order for dissolution of marriage, for judicial separation or declaring a marriage null and void, inquire into an ante nuptial or post nuptial settlement affecting either spouse and, whether or not there are children, make any order that, in its opinion, should be made to provide for the application of all or part of the settled property for the benefit of either or both spouses or a child of a spouse or of the marriage.

(3) The Supreme Court may, on application, where circumstances warrant, extend the period during which an application may be made or power exercised under this section.

The Act does not define what is meant by a "marriage," "ante-nuptial" or "post-nuptial" settlement. A separation agreement has been held to be a "post-nuptial settlement."[28]

In *Thomas* v. *Thomas*[29] sections 51 and 54 were distinguished as follows:

> Firstly, I consider that on a proper construction of [section 54] it only applies after there has been "an order for dissolution of marriage, for judicial separation or declaring a marriage null and void".
>
> Secondly, the court may only deal with the "settled property", that is the property covered by the settlement which is the subject of inquiry.
>
> In contrast, Section 51 applies whether or not there has been any order for dissolution, judicial separation or nullity. An application can be made under the section at any time during the subsistence of the marriage or up to two years after an order for dissolution, separation or nullity. After such two year period any party applying would not fall within the definition of spouse in Section 2.

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[23] *Rutherford* v. *Rutherford*, *supra*, n. 15. (B.C.C.A.).

[24] *E.g.*, Ontario and Saskatchewan.

[25] *Woods* v. *Woods*, (1973) 22 R.F.L. 370 (Ont. S.C.); *Sherwood* v. *Sherwood*, (1980) 18 R.F.L. (2d) 200 (Ont. U.F.C.); *Klein* v. *Klein*, (1980) 17 R.F.L. (2d) 231 (Ont. S.C.); a separation agreement, reasonable when made, can become unconscionable by changed circumstances: *Mance* v. *Mance*, Canadian Family Law Guide, 25,533; *Poole* v. *Poole*, (1981) 23 R.F.L. (2d) 439 (Sask. U.F.C.). A distinction should be made between the court's power to vary maintenance under the *Divorce Act* and to vary maintenance and property divisions under the *Family Relations Act*. Arguably similar tests should be applied to determine whether an agreement should be varied. The jurisdiction under the *Divorce Act*, however, is confined to varying maintenance agreements and should not be used to vary property settlements, or order the transfer of property, since that Act is not so broadly framed: *see* James G. McLeod, "Annotation on *Hoyer* v. *Hoyer*," (1982) 24 R.F.L. (2d) 44.

[26] *Margolese* v. *Margolese*, [1980] 2 W.W.R. 723 (B.C.S.C.); *Goodman* v. *Goodman*, (1980) 19 R.F.L. (2d) 415 (B.C.S.C.); *Mirus* v. *Mirus*, (1980) 15 R.F.L. (2d) 152 (B.C.S.C.); *Kachel* v. *Kachel*, (Unreported B.C.S.C. decision) [1981] B.C.D. Civ. 1680-04; *cf. Burritt* v. *Burrin*, (Unreported B.C.S.C. decision) [1980] B.C.D. Civ. 1647-14; *Green* v. *Green*, (Unreported B.C.S.C. decision) March 8, 1982, Van. Reg. No. A 801495, per Huddart L.J.S.C.

[27] *Withrow* v. *Withrow*, (1980) 20 R.F.L. (2d) 115 (B.C.S.C.) *Acorn* v. *Acorn*, (1980) 15 R.F.L. (2d) 257 (B.C.S.C.); cf. *Dodds* v. *Dodds*, (Unreported B.C.S.C. decision) [1980] B.C.D. Civ. 1680-08 *per* Anderson L.J.S.C.

[28] *Thomas* v. *Thomas*, (Unreported B.C.S.C. decision) Vancouver Registry No. 5936/D037933, March 17, 1981; *Divinsky* v. *Divinsky*, (1971) 2 R.F.L. 372; *Worsley* v. *Worsley*, (1869) L.R. 1 P. & D. 648; *Horoshok* v. *Horoshok*, (1965) 53 W.W.R. 482, 54 D.L.R. (2d) 615 (Man. Q.B.).

[29] *Ibid.*

Thirdly, under Section 51 the court is not limited to property covered by the marriage agreement but ". . . the court may order that other property not covered . . . by the marriage agreement . . . of one spouse be vested in the other spouse."

Another distinction to be made between the two sections is the extent of the court's discretion. In *Divinsky* v. *Divinsky*, 1971, 2 R.F.L. 372, McIntyre, J. (as he then was), in dealing with the then Section 14 of the Supreme Court Act (a predecessor to Section 54) and the issue of the court's discretion stated at page 375, "I am of the opinion that in proceedings of this kind the trial judge has full discretion in the matter which he must exercise judicially according to the well established judicial principles . . .".

In dealing with the court's discretion under Section 51, the courts of this province in several cases, for example, *Margolese* v. *Margolese* (1980) 2 W.W.R. 723, held that the proper approach to Section 51 is to be found in the decision of Galligan, J. in *Silverstein* v. *Silverstein*, 1 R.F.L. (2nd) 239 (Ontario High Court), wherein he dealt with similar Ontario legislation and held that the court, in determining the fairness of the division of property under that section had to have regard to the statutory criteria set forth in the section granting the court the power to make such division.

The court's discretion under Section 54 would appear then to be broader in that it would not be subject to the statutory constraints of Section 51.

Section 54 is based upon section 5 of the English *Divorce and Matrimonial Causes Act*.[30] That section is as follows:

As to marriage settlements of parties after final decree of nullity of marriage.

5. The court after a final decree of nullity of marriage or dissolution of marriage may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents as to the court shall seem fit.

The word "settlements" in this context is given a wide interpretation.[31] It is neither wise nor possible to give it a precise meaning[32] beyond that it is an arrangement made by one spouse to the other *in the character of spouse*.[33] Section 5 of the English Act was enacted two years after the *Divorce Act* of 1857, to meet the difficulty that arose where, although the marriage had been dissolved, the parties were still bound by agreements respecting their property made before or during the marriage.[34] It would appear, therefore, that when it was enacted, it was not intended to vary agreements between spouses made in anticipation of the dissolution of their marriage (i.e., separation agreements). It was intended to remedy injustices flowing from agreements respecting division of property during the course of the marriage, made by parties who expected the marriage to endure. Whether the practice of the courts in using this power to vary property settled in separation agreements is legitimate, is certainly open to question. Nevertheless, almost immediately after the enactment of the section, it was construed to apply to a separation agreement.[35]

The courts have been able to construe the section widely because of the very general terms used ("ante-nuptial," "post-nuptial") to create the power to vary. A post-nuptial settlement has been construed to include virtually any agreement between the spouses during the course of the marriage, provided it is made on the spouse in his or her character as a spouse. The particular form does not matter.[36] It is open to argument whether a decision by agreement or

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[30] 22 & 23 Vict., c.61.

[31] *Bosworthick* v. *Bosworthick*, [1927] P. 64 (C.A.); *see also Link* v. *Link*, [1983] B.C.D. Civ. 1673-01 (B.C.S.C.).

[32] *Melvill* v. *Melvill*, [1930] P. 159 (C.A.).

[33] *Supra*, n. 30.

[34] *Ibid.* at 69.

[35] *Stone* v. *Stone and Brownrigg*, (1864) 3 Sw. & Tr. 372, 373; 164 E.R. 1319.

[36] *Prinsep* v. *Prinsep*, [1929] P. 225.

acquiescence to place matrimonial property in the name of the husband alone, where the wife has contributed to its acquisition, is a post-nuptial agreement settling property within the meaning of the section.[37] In some cases, it has been held that such transactions constitute outright gifts which may not be varied under the section.[38] The authority of these cases has been doubted in *Smith* v. *Smith*, *Halpern* v. *Halpern* and *Parrington* v. *Parrington*.[39] It should follow that in an application to vary a separation agreement the court is not foreclosed from reviewing other "post-nuptial contracts" concerning title to matrimonial property. Alternatively, "post-nuptial contracts" relating to specific property merge in a separation agreement which confirms the spouses' title to their separate property.

While the discretion of the court to vary marriage agreements and settlements is very broad, provided both spouses are still alive, there are a number of issues that may arise after one spouse has died, which the courts have not yet had to address. For example, may a spouse who has received an unfair portion of property apply to the court for reapportionment after the other spouse has died? May the personal representative of a deceased spouse apply for variation? If not, may a personal representative continue an application commenced by a spouse who dies before the hearing? What criteria should the court consider on an application to vary entitlement to family assets when one spouse is deceased? In an application brought on behalf of a deceased spouse, is it significant that the deceased spouse has no need for a greater share of family property and that any award made will only benefit the deceased spouse's heirs or next-of-kin? Should it be significant whether the application is brought by the spouse who possesses legal title? There are no clear answers to any of these questions. It is possible, however, to make predictions based upon the functions sections 51 and 54 are designed to perform, and upon the fundamental policy of the Act.

1. Entitlement to Family Assets

In order to remedy what were perceived to be injustices which flowed from dividing family property between spouses on marriage breakdown based upon concepts of separate property, the Legislature, in 1972, gave the courts power to divide property fairly and equitably between the spouses. Section 8 of the *Family Relations Act* (1972)[40] provided as follows:

> **8.** (1) Where the court makes an order for dissolution of marriage or judicial separation, or declaring a marriage to be null and void, and it appears that a spouse is entitled to any property, it may, not more than two years from the date of the order, make any order that, in its opinion, should be made to provide for the application of all or part of the property, including settled property, for the benefit of either or both spouses or a child of a spouse or of the marriage.
>
> (2) Where the court makes an order under subsection (1), it may order that the property be sold and direct the disposition of the proceeds.

In 1978, the Legislature introduced the current *Family Relations Act*, which substantially changed the framework of spousal rights to family property. Under the 1972 Act, the courts had jurisdiction to vary the division of matrimonial property. Under the 1978 Act, the spouses are "entitled" to an undivided one-half interest in family assets as tenants-in-common.[41] The courts may vary this share if, in the circumstances, it is unfair.

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[37] *See, e.g., Halpern* v. *Halpern*, [1951] P. 204, [1951] 1 All E.R. 315; *Smith* v. *Smith*, [1945] 1 All E.R. 584; *Vaughan* v. *Vaughan*, [1953] 1 Q.B. 762 (C.A.), [1953] 1 All E.R. 209; *Parrington* v. *Parrington*, [1951] 2 All E.R. 916; *Paul* v. *Paul and Farquhar*, (1870) L.R. 2 P & D 93; *Nepean* v. *Nepean*, [1925] P. 97: all of which concern isolated transactions within marriage concerning title to property.

[38] *Hubbard* v. *Hubbard*, [1901] P. 157 (C.A.); *Brown* v. *Brown*, [1937] P. 7; [1936] 2 All E.R. 1616.

[39] *Supra*, n. 36.

[40] S.B.C. 1972, c. 20.

[41] Section 43.

The *Family Relations Act*, 1978 does not define what is meant by "entitled." It may mean that, on a triggering event, an interest in family assets vests in each spouse so that each spouse has proprietary rights in family assets. Conversely, it may mean that a spouse who does not have legal title to family assets, is given a personal right to share in those assets. The Ontario *Family Law Reform Act*, which contains similar provisions respecting spousal rights to family assets, specifically says that these rights are personal.

Whether these rights are proprietary or personal determines:

(i) whether a surviving spouse may assert rights to family assets against the estate of a deceased spouse,

(ii) whether a personal representative, on behalf of the estate of a deceased spouse, may assert rights to family assets against a surviving spouse, and

(iii) what criteria the courts will consider when varying a division of property.

If these rights are proprietary, the order of the court should be the same, whether the application is against or for the estate of a deceased spouse. If these rights are personal, the order of the court will vary depending on whether the application is against or for the estate of a deceased spouse. For example, if these rights are personal, an order in favour of the estate of a deceased spouse would tend to be less than one made in favour of a surviving spouse because the deceased spouse no longer needs a favourable division of family property, and any increased share would only benefit the spouse's heirs or next-of-kin.

The effect that the death of one spouse has on the court's power to vary a post-nuptial settlement under section 5 of the English *Matrimonial Causes Act*, 1859, the predecessor to section 54, was considered in 1898 in *Thomson* v. *Thomson and Rodschinka*.[42] The petitioner brought an application to vary a marriage settlement after obtaining a decree absolute of divorce, but died before the hearing. It was held that the court's power was limited to making alterations for the personal benefit of the husband, wife or children of the marriage. The proceedings could not be continued by the deceased's personal representatives for the benefit of his estate.

A recent British Columbia case also suggests that the courts will not exercise jurisdiction after the death of one spouse. *Hurst* v. *Benson*,[43] concerned a happily married couple. Upon the wife's death, the husband discovered he had been disinherited by his wife. He applied for a declaration pursuant to section 44 of the *Family Relations Act* that the spouses had no reasonable prospect of reconciliation, since his wife was deceased, and that he was entitled to a one-half or greater interest in family assets pursuant to section 54. He also applied for a declaration of resulting trust in the matrimonial home and for relief under the *Wills Variation Act*. Ruttan J. found that Part III of the *Family Relations Act* contemplated:[44]

> . . . a man and wife who are living apart, either by reason of divorce, separation or nullity, with no prospect that they will reconcile. It does not cover cases of separation only by reason of death of one of the parties.

We discussed earlier that Part III of the *Family Relations Act* does not apply to a marriage ended by the death of one spouse. Accordingly, the court would have no jurisdiction under the *Family Relations Act*, in this case, to make an order respecting the rights of the surviving spouse of a marriage in which there

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[42] [1896] P. 263; 65 L.J.P. 80; 74 L.T. 801 (C.A.).

[43] (1981) 9 E.T.R. 274 (B.C.S.C.) *see also*, *Kiss* v. *Palachik*, (1982) 34 O.R. (2d) 484 (Ont. C.A.).

[44] *Ibid.* at 283.

was no dispute or breakdown. Ruttan J. however, went one step further. He held that the plaintiff, because he was a widower, was no longer a husband or a "spouse" within the meaning of the Act.

This reasoning could have far reaching consequences. Would the death of a wife separated from her husband make the husband no longer a "spouse" under the Act? With respect, Part III did not apply to the surviving husband in *Hurst* v. *Benson* because there had been no separation, not because the wife had died.[45]

In *Johal* v. *Johal*,[46] the wife commenced an action for a declaratory order under section 44 of the *Family Relations Act* that the parties had no reasonable prospect of reconciliation. After commencing the application, the wife died. Notwithstanding that the pleadings of both parties indicated agreement that there was no reasonable prospect of reconciliation, the order could not be made. Under section 44, an order could only be made where the spouses are married to each other. The wife's death ended the marriage. An interest in family assets did not vest since there was no "triggering event." In *Momot* v. *Momot*,[47] the husband died after the wife commenced proceedings for divorce. The wife then applied for a declaration under section 44. The application was refused since she was no longer a spouse within the meaning of the section. In *Fong* v. *Fong*,[48] the wife died after a section 44 declaration that the spouses had no reasonable prospect of reconciliation, but before the hearing to divide family assets. It was held that the deceased person's cause of action did not abate by her death. The declaration "triggered" the vesting of a half interest in family assets as a tenant-in-common to which her estate was entitled.[49] It appears, therefore, that provided a triggering event occurs before the death of one spouse, the courts will enforce the deceased spouse's entitlement to family assets. *Fong* v. *Fong*, however, may only stand for the proposition that an action commenced by a spouse under the *Family Relations Act*, may be continued after that spouse's death by his or her personal representative. There is still some doubt as to a deceased spouse's entitlement where no action is commenced before that spouse's demise.

While whether rights under the *Family Relations Act* are personal or proprietary has not been settled, soon the courts will be placed in a position of having to determine this issue. Under the *Act* a spouse is defined as:[50]

> . . . a wife or husband and includes, . . . (b) where an order for dissolution of marriage, judicial separation, or declaring the marriage to be null and void was made respecting a marriage of a person not more than 2 years before the person applies for an order under this Act, the person making application . . .

Professor Farquhar has made the following observations respecting the significance of this definition:[51]

> . . . a question arises as to the significance of the two year period following a divorce, a judicial separation or a declaration of nullity. Divorced persons or persons whose marriage has been declared a nullity are clearly not "spouses" in

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[45] The surviving spouse received a portion of the deceased's estate under the *Wills Variation Act*: *Hurst* v. *Benson*, [1983] B.C.D. Civ. 4223-04 (B.C.C.A.).

[46] (1981), 34 B.C.L.R. 391, 26 R.F.L. 453 (B.C.S.C.).

[47] [1983] B.C.D. Civ. 1595-01 (B.C.S.C.); *cf. Harrison* v. *Harrison*, (1982) 29 R.F.L. (2d) 10 (B.C.S.C.).

[48] (1982) 25 R.F.L. (2d) 277, (1982) 34 B.C.L.R. 50, *per* Anderson J. (B.C.S.C.); *cf. Maroukis* v. *Maroukis*, (1981) 24 R.F.L. (2d) 113, 125 D.L.R. (3d) 718 (Ont. C.A.), where it was held that no rights arose under the Ontario *Family Law Reform Act* until court order. This decision is on appeal to the Supreme Court of Canada.

[49] The husband appealed the court's declaration of no prospect of reconciliation on the ground that the court had no jurisdiction to make that declaration on the application of one spouse alone. That appeal was dismissed: *Fong* v. *Fong*, (1982) 25 R.F.L. (2d) 123, 33 B.C.L.R. 11 (B.C.C.A.). Notwithstanding the wife's death, her estate was entitled to an equal share of family assets: *Fong* v. *Fong*, (1982) 15 A.C.W.S. (2d) 143 (B.C.S.C.).

[50] Section 1.

[51] Keith B. Farquhar, "The New Matrimonial Property Legislation in British Columbia: The First Year," (1981) 15 U.B.C.L. Rev. 1, at 7-8.

the ordinary legal sense, but the Act, for certain purposes, declares them to be so. What is the effect of this? Let us assume the case of a husband and wife in which the husband has legal title to, or possession of, all of the family assets. A divorce is then granted. For the succeeding two years neither party takes any step in relation to the property. In the third year the former husband attempts to dispose of the property and the former wife then attempts to restrain him from doing so, on the basis of her half interest. Can it be said that because the wife's first application to the court occurs later than two years after the divorce she is no longer a spouse and has no interest in the property? In other words, has her interest divested by effluxion of time? This seems a highly unlikely result. Yet some significance must attach to the two year period. A more likely interpretation would appear to be that the former husband, having taken no steps in relation to the property in the two years after the divorce, is prevented from raising, in the third year, under section 51, the issue of an unequal distribution in his favour. This ambiguity suggests that, as a matter of drafting technique, it would have been wiser to deal with definitions and a limitation period in different sections.

The *Family Relations Act* has been in place now for more than two years. It is likely, therefore, that the courts will soon have to determine whether a spouse "entitled" to family assets, who brings an application to enforce that entitlement more than two years after a divorce, judicial separation or declaration of nullity, is still entitled to an undivided one-half share in family assets. It is submitted that, if "entitlement" persists beyond the two years, then section 43 confers upon each spouse vested proprietary rights.

2. Effect on Recommendations

The recommendations we have made with respect to statutory succession are based upon the premise that a separated or former spouse whose succession rights are barred, is adequately protected by the *Family Relations Act*. This is not the case, however, unless the rights that arise under the *Family Relations Act* with respect to family assets, are unaffected by the death of one spouse.

While all of the provinces, except Quebec, have enacted similar legislation with respect to matrimonial property, only a few have specifically dealt with the problems that arise upon the death of one of the spouses. The Ontario *Family Law Reform Act*[52] provides that the surviving spouse may not commence or continue an action for a share in family assets against the estate of the deceased spouse.[53] Conversely, both New Brunswick[54] and Saskatchewan[55] specifically provide that an application for a matrimonial property order may be commenced or continued by the surviving spouse or continued by the personal representative of a deceased spouse. These statutes also provide that death is a triggering event for the purpose of permitting the spouse to apply for an equal share in matrimonial property. They do not, however, cause property to vest in the surviving spouse.

In two recent cases, the effect of the Saskatchewan Act has been considered. In *Bugoy* v. *Bugoy*,[56] the wife applied for distribution of matrimonial property. She died before the application was heard. Her personal representative continued the action on behalf of her estate. The court found that

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[52] R.S.O. 1980, c. 152, s. 4 (1), (3); with respect to the effect of the death of one spouse on rights to family property, *see* A.J. McClean, "Matrimonial Property — Canadian Common Law Style," (1981) 31 U. of T.L.J. 363; *see also*, Basil D. Stapleton, "Death and Property Rights in New Brunswick — Recent Developments," (1981) 30 U.N.B. Law Journal 198. A.H. Oosterhoff, "The Effect of Death on Familial Obligations," (1981) 23 R.F.L. (2d) 272; Alistair Bissett-Johnson, "Death and The Matrimonial Property Act," (1982) 25 R.F.L. (2d) 182; *Fraser* v. *Vincent*, (1982) 25 R.F.L. (2d) 171 (N.S.S.C.); *Re Levy*, (1982) 25 R.F.L. (2d) 149 (N.S.S.C.).

[53] *See Re Nevile and Beckstead*, (1979) 27 O.R. (2d) 59; there is, however, some doubt on whether the Ontario *Family Law Reform Act* has no application on the death of one of the spouses: *see Christo* v. *Bevan*, (1982) 36 O.R. (2d) 797 (Ont. H.C.).

[54] *Marital Property Act*, S.N.B. 1980, c. M-1.1.

[55] *Matrimonial Property Act*, S.S. 1979, c. M-6.1.

[56] [1981] 4 W.W.R. 136 (Sask. Q.B.).

because the wife had altered her will to leave everything to a friend, her death constituted an extraordinary circumstance which justified dividing the matrimonial property unequally.

The court said:[57]

> In these circumstances, the application, which was, while the wife was [alive], a disagreeable marital dispute, has become, on her death and on the continuation of her application by an interested personal representative, a bitter and corrosive feud made all the more so since what is at stake is a modest family farm created by this couple with the help of their only son through thirty years of considerable industry and self denial.

The court concluded:[58]

> Is there any "extraordinary circumstance" here to be taken into account which may justify an order for other than an equal distribution, if for one or more of the reasons I have mentioned I was satisfied it was unfair or inequitable to do so? I believe there is. Mrs. Bugoy's death at age 46 has served to alter radically the issue as respects the matrimonial home. And that is, in my opinion, an extraordinary circumstance within the meaning of the Act. By reason of her death and the will she left, were I to order an equal division of the matrimonial home or its value half of it would go to strangers or others who have no need of it, have contributed nothing to it and would be depriving the respondent of what he worked for 30 years to build with the assistance of his father, his sister and his brother-in-law.

The wife's estate received a payment of $10,000. The remaining matrimonial property, valued at $120,000, was vested in the husband.

In *Smith* v. *Smith*[59] the applicant widow applied for a division of matrimonial property under both the Saskatchewan *Matrimonial Property Act* and *Dependants' Relief Act*. The applicant and the deceased had been happily married until the deceased's death. The deceased, by will, gave his wife a life estate in all of his property. It was found that the applicant, at the deceased's urging, had full use of her separate estate during the course of the marriage. The court held that this was sufficient reason to divide the estate unequally. The wife was granted a one-half interest in the matrimonial home. As to the remaining property, the wife was awarded only the income from it for her life. Apart from the half-interest in the matrimonial home, the court found that the wife's entitlement under the Saskatchewan *Matrimonial Property Act* was exactly what it would have been had she relied upon the deceased's will.

It would appear that the effect of Saskatchewan legislation respecting succession and family property is to create an overlapping system of rights, which, although analytically designed to perform different functions are, in their application, subject to similar tests. In an annotation to this case, Professor James G. McLeod observes:[60]

> Although the decision is reasonable in the circumstances, analytically, it would have been more satisfying if the court had dealt with the property issue more precisely. According to the Act (s. 21(2)(l)) the court had to refer to the will. The preferable approach would have been to decide whether a deviation from the equal sharing was required under s. 21. It appears from the reasons it was. Then a decision as to the appropriate property rights could have been made and the succession rights added. In substance, the decision denies any interest in the assets given an 18-year marriage since the wife is left with her succession rights only. It is unfortunate that the reason why no property rights were given was not more clearly spelt out to assist future courts.

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[57] At 137.

[58] At 141.

[59] (1981) 21 R.F.L. (2d) 429 (Sask. Q.B.); *see also Watt* v. *Watt*, (1982) 11 E.T.R. 132 (Sask. Q.B.).

[60] *Ibid.* at 430. *See also Kiss* v. *Pulachik*, (1982) 34 O.R. (2d) 484, 24 R.F.L. (2d) 337, 10 E.T.R. 217 (Ont. C.A.), *aff'd*. [1983] S.C.C. D. 2206-01 (S.C.C.), where the basis of the trial judge's decision, entitlement to family assets, was overruled by the Ont. C.A., but the result was affirmed relying on dependant's relief legislation as well as a constructive trust; *Watt* v. *Watt*, *ibid.* wife entitled to half share in family assets under *Matrimonial Property Act* and then remainder of estate under *Dependants' Relief Act*.

> At a more fundamental level, the difficulty may arise because the legislation regarding sharing may be invoked after death. The difficulty could have been avoided if the sharing rules were restricted to the life of the payor, and any subsequent claims left for solution under succession law, including dependants' relief legislation.

We agree in part with Professor McLeod's conclusion that these difficulties arise from the failure to distinguish adequately between rights to succession and rights to family property.[61] Our approach throughout this Report has been to clarify when rights to succession should govern, and when the surviving spouse should rely upon rights to family property. We do not think, however, that a spouse who would have possessed rights to family property, had the other spouse survived, should have to forego these rights and rely upon his or her entitlement under succession simply because of the death of the other spouse. Our conclusion is that in most cases concerning succession, the surviving spouse should be entitled to a generous share of the estate, quite apart from considerations of proprietary rights created during the marriage. In the event of a marital break-up, the surviving spouse should be entitled to a fair, not necessarily generous, share of the estate. While the *Family Relations Act* does direct the courts to consider matters of fairness and equity, by and large this entitlement is probably based upon proprietary rights flowing from direct or indirect spousal contributions to the family and to the acquisition of property. Rights under succession legislation and under family property legislation differ then in both the functions they are to serve and the guidelines and tests to be observed when granting or enforcing them.[62]

Our earlier recommendations are designed to define when succession legislation and when family property legislation should apply. It is essential, therefore, that the rights of a separated or former spouse, who is barred from taking on succession, should continue against the estate of the deceased spouse. This may be accomplished in one of two ways:

(i) by clarifying that rights to family property under the *Family Relations Act* are proprietary, or

(ii) if these rights are personal, by providing specifically that rights to family property that have arisen under the *Family Relations Act* continue after the death of one spouse.

It would appear that the Legislature was reluctant to state that rights to family property under the *Family Relations Act* are proprietary in nature. If actual proprietary rights vest on marital break-up, this could have profound effects, rendering title uncertain and conceivably having the potential of prejudicing third party interests. The most that can be said is that these rights resemble or are akin to proprietary rights. The courts, in some circumstances, will treat them as vested, and in others, as inchoate rights that may be varied or vested as may be appropriate in the circumstances. We have tentatively concluded that when rights to family property under the *Family Relations Act* have arisen during the joint lifetime of the spouses, the death of one spouse should be immaterial. The surviving spouse or the personal representative of the deceased spouse should be able to commence or continue any action under the *Family Relations Act*, which could have been brought had the deceased

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[61] More recently, the Saskatchewan courts have made greater efforts to distinguish between rights to succession and rights to family property: *see Re Serdula*, (1983) 34 R.F.L. (2d) 183 (Sask. Q.B.).

[62] *Richards* v. *Person*, [1982] 2 W.W.R. 668 (B.C.S.C.) in which the court noted that it was vested with a broad discretion and with a duty " . . . always to seek guidance by reference to contemporary custom, and particularly to those rules which the community has adopted as part of the statute law." *The Family Relations Act* principles with respect to matrimonial property were used as a guide to the appropriate distribution of the estate; this decision has been disapproved of by the British Columbia Court of Appeal on appeal (1983) 20 A.C.W.S. (2d) 315 (B.C.C.A.) and in *Bates* v. *Bates and Froom*, (1982) 11 E.T.R. 310 (B.C.C.A); *Kiss* v. *Palachik*, *supra*, n. 60.

spouse survived, to enforce rights to property granted under that statute, or to vary those rights, as may be appropriate in the circumstances of the case.

A recommendation to amend the *Family Relations Act* to provide or to confirm that an application respecting rights to family property may be made or continued by the surviving spouse after the death of the other spouse, or by the personal representative of the deceased spouse, would preserve the standing of both the surviving spouse and of the personal representative. In other provinces, which extend the ambit of matrimonial property legislation to circumstances when one spouse has predeceased the other, the rights of a personal representative are restricted to continuing an application. The Saskatchewan legislation provides, for example:[63]

> **30.** (1) An application for a matrimonial property order may be made or continued by a surviving spouse after the death of the other spouse or may be continued by the personal representative of the deceased spouse.

There are two possible explanations for this restriction. Firstly, the Saskatchewan Act does not distinguish between an application by a separated or former spouse and an application by a surviving spouse whose marriage has been ended by the death of the other spouse. This is a distinction we have taken great pains to make in our recommendations. Secondly, the Saskatchewan Act does not distinguish between the tests to be applied when determining rights to succession or rights to family property. As a result, Saskatchewan courts appear to apply the same principles to an action respecting succession rights that they would to one respecting rights to family property. In the *Bugoy* case mentioned earlier, the death of the applicant before the hearing was regarded by the court as an extraordinary circumstance which permitted it to make an order quite different from the one it would have made had the applicant survived.

In our opinion, the death of a spouse should make no real difference to entitlement to family property. In many respects, the *Family Relations Act* is designed to replace common law principles for determining rights to property between spouses. However, at common law, if a deceased spouse were entitled to a resulting trust in family property, the personal representative of the deceased spouse would be able to commence or continue an action respecting those equitable proprietary rights, and the entitlement of the estate of the deceased spouse would not be cut down. The *Family Relations Act* provisions respecting rights to family property were designed in part to remove the need to characterize the contributions made by each spouse. A spouse who contributed directly to the purchase of an asset was entitled to a resulting or constructive trust. One who had only looked after the family was not entitled to a resulting or constructive trust. The *Family Relations Act* recognized that an indirect contribution by a spouse of her services to the family was as valuable as a direct monetary contribution to the purchase of family assets. Unless the courts have jurisdiction to apply the principles of the *Act* when one spouse dies, this unjust distinction will continue.[64]

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[63] *Supra*, n. 55, s. 30.

[64] *See* A.J. McClean, "Constructive and Resulting Trusts — Unjust Enrichment in a Common Law Relationship — *Pettkus* v. *Becker*", (1982) 16 U.B.C.L.R. 155; *Kiss* v. *Palachik*, *supra*, n. 59; (1982) 24 R.F.L. (2d) 337, 34 O.R. (2d) (Ont. C.A.); *Willits* v. *Dixon*, (unreported Sask. Q.B. decision) (1981) 11 A.C.W.S. (2d) 219; *cf. Van de Mark* v. *Walton*, (1982) 34 O.R. (2d) 654 (Ont. H.C.) where it was held that placing the matrimonial home in the defendant's name alone constituted an outright gift, so that the plaintiff's claim under matrimonial property legislation, or a resulting or constructive trust could not succeed; *see also*, *Maruda* v. *Maruda*, (1982) 24 R.F.L. (2d) 389 (Man. Q.B.); James G. McLeod, "Annotation on *Maruda* v. *Maruda*," (1982) 24 R.F.L. (2d) 390; *Young* v. *Young*, (1981) 21 R.F.L. (2d) 388, 120 D.L.R. (3d) 662 (C.A.); *Leatherdale* v. *Leatherdale*, (1980) 31 O.R. (2d) 141, 19 R.F.L. (2d) 148, 118 D.L.R. (3d) 72 (C.A.) on the interface between matrimonial property legislation and the constructive trust; *Pratt* v. *MacLeod*, (1982) 11 E.T.R. 117 (N.S.S.C.).

We have also considered whether it is desirable or necessary to direct what principles the courts should apply when determining entitlement to family assets when one spouse has died. While we are convinced that the approach of the Saskatchewan courts is misguided, we recognize that cases that arise in these circumstances will be difficult to resolve. The *Bugoy* case was, without doubt, a "hard" case. It did not seem just to benefit the deceased spouse's heir at the expense of the surviving spouse. However, had the applicant spouse survived, or had the personal representative of the estate of the deceased spouse been able to pursue a proprietary right, the courts would have been obliged to divide family property more equally, even though the wife's will benefited a friend. In terms of principle, therefore, it would seem that *Bugoy* was wrongly decided.

We are reluctant, for two reasons, to propose specific guidelines for the courts when determining entitlement to family property after the death of one spouse. First, the *Family Relations Act* has only been in force for a relatively short time. It is too soon to say whether or not it is functioning adequately. Second, our conclusion is that the same guidelines which determine entitlement during the lives of the spouses should continue to apply after the death of one of the spouses. Those guidelines are already contained in the Act. It is only a question of how the courts will apply them.[65] Our conclusion that the principles which govern rights to family property during the joint lives of the spouses, should apply equally on the death of one of the spouses, does not mean that we have concluded that the approach taken by the *Family Relations Act* is right. That is an issue which is beyond the scope of this project.

Our goal throughout has been to harmonize rights of succession with the provisions of the *Family Relations Act*. This is a particularly difficult task, since the *Family Relations Act* provisions respecting matrimonial property are novel, and still largely untested.[66] Whether this legislative scheme is effective remains to be seen. Many of the defects of succession law, and the complex response necessary for their reform, are attributable to the novel approach taken by the *Family Relations Act*, with respect to entitlement to family assets.

In summary, some issues raised by the *Family Relations Act* have had to be considered in the context of this Report. In our discussion we have noted certain anomalies in British Columbia matrimonial property legislation, most particularly the gap that arises in that legislation upon the death of one spouse. We have tentatively concluded that the *Family Relations Act* should be amended to ensure that rights which arise under that Act during the joint lifetimes of spouses may be enforced after the death of one of the spouses. Nevertheless, we believe it would be inappropriate to make recommendations with respect to reform of the *Family Relations Act*, without first considering these questions in the full context of family law, or, at the very least, in the context of matrimonial property. That is a vast subject which is clearly beyond the scope of this Report.

Succession legislation can, however, provide a "back-up" to what we perceive to be gaps in matrimonial property legislation. Our earlier recommendations with respect to permitting separated and former spouses to apply under the *Wills Variation Act* will serve to protect them in circumstances where the provisions of the *Family Relations Act* are not adequate to do so.

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[65] *See, e.g., Granfield* v. *Williams*, (1981) 23 R.F.L. (2d) 127 (B.C.C.A.)

[66] *Supra*, n. 51, at 81.

E. Revocation of a Will on Marriage

Section 15 of the *Wills Act* provides:

> **Revocation by marriage**
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> **15.** A will is revoked by the marriage of the testator, except where
>
> (a) there is a declaration in the will that it is made in contemplation of the marriage; or
>
> (b) the will is made in exercise of a power of appointment of property which would not in default of the appointment pass to the heir, executor or administrator of the testator or to the persons entitled to the estate of the testator if he died intestate.

In our earlier study on the Making and Revocation of Wills, we discussed whether this section should be amended. Section 15 protects the surviving spouse and children of the marriage by preventing a will made before the marriage from taking effect. A will made before, but not in contemplation of, a marriage is unlikely to take into account the changed circumstances of the testator and his new family. The testator's family should not be disinherited merely because of his failure to take changed circumstances into account and revise his will. By revoking a will on marriage, the testator's spouse and issue take under intestate succession.

While it is desirable to protect a testator's family from the terms of a will which no longer correspond to the circumstances at the testator's death, section 15 does not necessarily achieve that goal. Indeed, it tends to create additional problems. Automatic revocation of a will on marriage is not a widely known rule. A testator might review his will after marriage and remain satisfied with its provisions, unaware that the will has been revoked. Revoking the will disinherits legatees who might have no right to claim a share of the deceased's estate on the resulting intestacy. The surviving spouse might become entitled to far more under the intestacy than is required to meet his or her needs. The revocation operates without regard to the circumstances of the case and for that reason it is an extremely blunt instrument. It could by way of extreme example, disinherit a crippled sister of the testator in favour of the testator's millionaire wife. Its effect is to upset the testator's carefully considered dispositions and impose upon his estate a statutory scheme of intestate distribution which may ignore obligations the testator expressly recognized. Mutual wills present special problems. Mutual wills may be made by two or more people, conferring benefits on each other. They may or may not agree that these wills are irrevocable. An agreement in restraint of marriage may be against public policy and void for that reason. Consequently, a mutual will made by a single person may be revoked by subsequent marriage[67] unless made in contemplation of that marriage. Revocation of a mutual will of a person who has already benefitted by another's will may be unfair. A hard and fast rule based upon the single issue of whether or not there has been a marriage is not flexible enough to deal with the diverse circumstances which may prevail. Considerations such as these led to the Commission proposing in Working Paper No. 28, The Making and Revocation of Wills, the repeal of section 15.

A number of people who responded to Working Paper No. 28 disagreed with the proposal to repeal section 15. One of our correspondents wrote:

> I do not agree with this proposal. The Working Paper, as I read it, offers three reasons for it. First, the rule under which a will is automatically revoked on marriage has been rendered redundant by changed social circumstances. What are

[67] *See, e.g., Robinson* v. *Ommanney, (1883) 23 Ch. D. 285; Re Marsland,* [1939] Ch. 820; *Re Oldham,* [1925] Ch. 75.

these changed circumstances? Second, a spouse and children are sufficiently protected by the Wills Variation Act. This does not afford them automatic protection; they have to rely on the exercise of judicial discretion. The protection afforded by the act is uncertain, depending very much on circumstances and perhaps on the attitude of a particular judge. It is a poor replacement for the automatic provisions of the law on intestate succession. Third, because of the Family Relations Act, it is suggested that there will be more marriage contracts and that the influence of the will will decline. That may be so, but it is far too early to start enacting legislation on that basis. In any event, if there is no marriage contract in a particular case, the other spouse would still require the protection afforded by the automatic revocation.

I think that the rationale behind the present law is sound. A testator should consciously disinherit his spouse and children. They are, I think, *prima facie* entitled to what the law gives them on intestacy. A testator is, of course, free to take that away if he so wishes, but he should do it by a conscious act.

In our Report No. 52, Making and Revocation of Wills, on reconsidering the proposal to repeal section 15, a majority of Commissioners concluded that a will should continue to be revoked on marriage. The tentative preference of the majority for retaining section 15, was based largely on the undesirability of compelling a surviving spouse to pursue a claim under the *Wills Variation Act*, rather than to rely on rights on an intestacy.

It was decided to postpone any decision on section 15 to our project on Statutory Succession Rights. A question ancillary to whether a will should be revoked on marriage is how to protect beneficiaries of a revoked will who would not share in the estate on the resulting intestacy. The issue of interfering with the testator's stated wishes in order to accommodate changed circumstances is intimately linked with the proposals we have to make with respect to intestate succession and dependant's relief legislation. Unless the beneficiaries under the will are the same as the testator's next-of-kin, the result of either revoking a will on marriage or letting it stand, is that someone will be disinherited.

1. Departing from the Testator's Stated Wishes in Order to Accommodate Changed Circumstances

At common law there was a great deal of confusion over how far a court would reach to prevent a will, which did not take changed circumstances into account, from taking effect. The will of a woman was revoked by her marriage. The will of a man was revoked by marriage plus the subsequent birth of a child. These rules were subject to inconsistent application partly because they were framed in absolute terms and focused entirely upon changed events. The courts came to inconsistent decisions as to whether a will which provided for changed events should be revoked. In *Kenebel* v. *Scrafton*,[68] for example, Lord Ellenborough held that the rule applied only when the surviving wife and children of the testator were wholly unprovided for in the will:[69]

> The doctrine of implied or presumptive revocations seems to stand upon a better foundation of reason, as it is put by Lord Kenyon, in *Doe* v. *Lancashire* (5 T.R. 58), namely, as being 'a tacit condition annexed to the will when made, that it should not take effect if there should be a total change in the situation of the testator's family,' than on the ground of any presumed alteration of intention; which alteration of intention should seem in legal reasoning not very material, unless it be considered as sufficient to found a presumption in fact, that an actual revocation has followed thereupon. But upon whatever grounds this rule of revocation may be supposed to stand, it is on all hands allowed to apply . . . only

[68] (1802) 2 East 530, 102 E.R. 472.

[69] *Ibid.* at 476-7 [E.R.]. *See also Marston* v. *Roe d. Fox*, (1838) 8 Ad. & El. 14; 112 E.R. 742; *Baxter* v. *Dyer*, (1800) 5 Ves. 656; 31 E.R. 790.

> in cases where the wife and children, the new objects of duty, are wholly unprovided for, and where there is an entire disposition of the whole estate to their exclusion and prejudice. This, however, cannot be said to be the case where the same persons, who, after the making of the will, stand in the legal relation of wife and children, were before specially contemplated and provided for by the testator, though under a different character and denomination.

In other cases, however, even wills which provided for the intended wife and children, were held to be revoked by the subsequent marriage and birth of a child.[70]

In the Fourth Report of the Commissioners on the Law of Real Property 1833,[71] the rules relating to implied revocations were described as "absurd and perplexing."[72] Their proposal that wills should speak with reference to the property comprised in them as at the time of the testator's death (our section 20) was made both to resolve problems that arose in the construction of a will and in order to prevent a mere alteration in the estate revoking the will. Without reasons, they proposed that the will of a woman should continue to be revoked by her marriage, presumably as a reflection of the status of women in the nineteenth century. Finally, they proposed that the will of a man should not be revoked by his marriage and the birth of a child. They argued:[73]

> If the hardship arising in individual cases, from the neglect of Testators to alter their Wills, is a sufficient reason for the continuance of the Rule, the same principle would afford ground for extending it. In some cases of marriage without children, and in others of children without any new marriage, more hardship is occasioned in consequence of leaving a Will unaltered, than in other cases in which there are both the circumstances of marriage and the birth of children. In many cases, Intestacy is equally prejudicial; and yet the Law cannot supply the want of a Will. It appears to us, that the Law having entrusted to every man a power of Testamentary disposition over his property, must rely upon its being exercised according to the Testator's intentions; and that no Will ought to be set aside on conjectures respecting what the Testator's intentions may have been in consequence of a change of circumstances. It may safely be asserted, that the present Law is not relied upon in practice; for no one neglects to cancel or alter his Will, because he knows that his marriage and the birth of a child will have the effect of revoking it. The numerous exceptions which have been admitted, prove that there are many cases in which it is expedient that, notwithstanding the marriage and birth of a child, the Will should remain unrevoked; and there are probably cases, not within any of the exceptions, in which proper and equitable Wills have been revoked by the present Law, contrary to the intention of the Testators. We believe that the inconveniences of the Rule preponderate over its advantages, and we therefore recommend that it should be abolished.

The Real Property Commissioners, therefore, advocated that a will should remain in force notwithstanding a subsequent marriage, at a time when there was no means to provide for a disinherited spouse, beyond rights of dower or curtesy, or to provide for children.

The *Wills Act, 1837*, however, provided that the wills of both men and women were automatically revoked on marriage. The Act also did away with any other aspect of implied revocation. Section 19 of the Act provided:

> That no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances.

The provision of the *English Wills Act, 1837* was revised so that it would not apply if there is a declaration in the will that it is made in contemplation of the marriage. Section 15 of our *Wills Act* follows that approach. This exception ensures that the testator has turned his mind to changed circumstances. It

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[70] *In the goods of Cadywold*, (1858) 1 Sw. & Tr. 34, 27 L.V. Pr. 36; 164 E.R. 617.

[71] 1833.

[72] At 31.

[73] At 32.

does not, however, ensure that the will makes adequate provision for those changed circumstances.

The function of dependant's relief legislation is to ensure that adequate provision is made for the deceased's spouse, children and other dependants. Such legislation serves to protect the deceased's dependants from his neglect, spite or irresponsibility. Additionally, it safeguards the deceased's dependants from changed circumstances which were not taken into account when the will was made. In our opinion, it is desirable to interfere with the testator's stated wishes in order to accommodate changed circumstances. The Commission is divided, however, whether to do this it is necessary to revoke the testator's will on marriage.

2. Protecting the Surviving Spouse

A significant argument in favour of revoking a will on marriage is that it ensures that the surviving spouse will be entitled on the resulting intestacy. If the will were not revoked the spouse would have to apply under dependant's relief legislation, and any order made would be in the court's discretion. The position of the surviving spouse under these circumstances differs markedly from that of, for example, a divorced spouse, who, on marriage breakup, becomes entitled to a *prima facie* one-half interest in family assets.

In our Report No. 52, The Making and Revocation of Wills, we suggested that the burden of a court application should not fall on the testator's family. Upon further reflection, a majority of the Commission remains convinced that this is a significant concern. Marriage constitutes a fundamental change in circumstances, to which the testator should direct his mind. Failing that, the will should not take effect, and the estate should pass on an intestacy.

A minority of the Commission favours repealing section 15. A will made before marriage which is never revised is not conceptually different from a will made after marriage which does not make adequate provision for the testator's dependants. The *Wills Variation Act* provides satisfactory protection to a surviving spouse. Revocation by operation of law, which is based upon the occurrence of a particular event without reference to the provisions of the document revoked, is inappropriate, primarily because of the prejudice to beneficiaries under the revoked will.

The effect of revoking a testator's will is to deprive beneficiaries under the will who are not dependants, of any remedy whatsoever. Nevertheless, as we noted earlier, most testator's who have a spouse and issue, will leave everything to the spouse. It would appear, therefore, that a failure to revise a will made before marriage occurs through oversight rather than intention. A majority of the Commission has concluded that the necessity of protecting the interests of the surviving spouse justifies possible prejudice to the testator's beneficiaries. Our correspondents tended to agree with that position. It is possible, however, to offer some protection to beneficiaries of a will revoked by marriage.

3. Protecting Beneficiaries of the Will if Section 15 is Retained

If section 15 is retained, unless the beneficiaries of the revoked will qualify as persons permitted to apply under the *Wills Variation Act*, they will have no recourse. However, an option for the protection of these beneficiaries arises from our proposal to extend *Wills Variation Act* principles to intestacies. To mitigate the sometimes harsh consequences of section 15, beneficiaries of

a revoked will might be granted the right to apply under the *Wills Variation Act* for a share of the deceased's estate.

The *Wills Variation Act* is primarily designed to provide maintenance for a testator's depenants. It can also be used to give effect to the testator's intentions. The testator's desire to benefit a beneficiary may be evidence of a moral obligation which ought still to be honoured, notwithstanding that the testator's marriage has significantly altered the testator's obligations.[74] Beneficiaries of a will disentitled by operation of law could be permitted to apply to the courts. The courts could have discretion to provide for such beneficiaries from the testator's estate guided by the intention of the testator contained in his will, and with reference to all the circumstances, changed or otherwise. If the testator's estate is large, an order in favour of the disentitled beneficiary should pose no problems. If the testator's estate is small, such an application would be more likely to fail.

In the Working Paper we proposed that beneficiaries of a will revoked by operation of law should be permitted to apply under the *Wills Variation Act*. Response was divided on this proposal. It was observed, for example, that the basis of the court's jurisdiction would be uncertain and could cause problems. For example, what considerations should the court take into account if the beneficiary is a charity. This is a problem which will not arise often. A complex response is undesirable. The court will consider the interests of the intestate successors, the size of the estate, and the claims of beneficiaries under the revoked will. We are satisfied that the courts should be able to resolve these problems satisfactorily.

We have concluded that the option of permitting beneficiaries of a revoked will to apply under the *Wills Variation Act*, is the best and most flexible means of limiting prejudice to them arising from revocation of a will by marriage.

The Commission recommends:

21. That section 15 of the Wills Act *should not be repealed.*

22. That beneficiaries of a will revoked by section 15 of the Wills Act *should be permitted to apply under the* Wills Variation Act *for a share of the intestate's estate.*

4. Revising Section 15

An issue that arises from our conclusion to retain section 15, is whether it satisfactorily permits a testator who wishes his will to survive his marriage to make that provision. Under the current section, a will is not revoked by marriage where "there is a declaration in the will that it is made in contemplation of the marriage." That exception to section 15 is modelled after section 177 (1) of the English *Law of Property Act 1925*. To come within this exception to section 15 the will must have been made in contemplation of a

[74] *See, e.g., Re Gilbert*, (1976) 24 R.F.L. 128 (Ont. H.C.): oral promises by deceased to support estranged wife evidence of moral obligation; *and see Granfield v. Williams*, (1981) 23 R.F.L. (2d) 127 (B.C.C.A.).

specific marriage which takes place.[75] In *Re Hamilton*,[76] for example, the testator directed that, if he married before his death, his widow was to receive his estate. Because the will was not made in contemplation of a specific marriage, the will was revoked upon his marriage. In *Sallis* v. *Jones*,[77] the last sentence of the will read, "this will is made in contemplation of marriage." The will was revoked by the testator's subsequent marriage. Extrinsic evidence disclosed that the testator did not propose to the woman he married until after he made the will. The statement made in the will was a mere reference to an intention to marry that did not raise the exception to revocation by marriage.

In other jurisdictions with provisions similar to section 15, it is sufficient if the intention to marry can be gathered from the will as a whole[78] or that it merely refers to a general intent to marry sometime in the future, provided it can be demonstrated by extrinsic evidence that the testator's subsequent marriage was to a person he intended to marry when he made his will.[79] In the English case, *In the Estate of Langston*,[80] for example, the testator left everything to "my fiance (naming her)." That was held to be a clear indication of a contemplation to marry the named woman.

In British Columbia, courts may take a less flexible approach to determining whether the testator's will was made in contemplation of marriage. In *Re Pluto*,[81] the testator left "all to my wife (naming her)." He married the named woman the very next day. It was held that the marriage revoked his will. Hinkson J. said that explicit language was necessary to raise the exception to section 15. It was not open to the court to make inferences. The use of the word "wife" does not suggest that a marriage is contemplated. It suggests that the marriage has already taken place.[82] Professor Feeney, commenting on this case,[83] argues that "a judge should not be so literal in interpreting a will and it would seem to be proper to make an inference in a case like this . . ."[84] He concludes that:[85]

> If the *Pluto* case is to be followed, the Canadian law would seem to be that, although the will need not contain explicit language that it is made "in contemplation of marriage" and an inference thereof will be made in a proper case, there must be a clear indication that the testator intended to marry a particular named person, such as by calling that person "my fiance", but the inference is not to be made by his calling the person "my wife".

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[75] *Sallis* v. *Jones*, [1936] P. 43; *Re Pluto*, (1969) 69 W.W.R. 765 (B.C.S.C.); *Re Sedgwick*, [1931] 1 W.W.R. 837 (B.C.S.C.). A bill entitled *The Administration of Justice Bill, 1981* has been introduced in England which amends that approach to protect portions of a will from revocation:

> [10] —(1) Subject to subsections (2) to (4) below, a will shall be revoked by the testator's marriage.
>
> (2) A disposition in a will in exercise of a power of appointment shall take effect notwithstanding the testator's subsequent marriage unless the property so appointed would in default of appointment pass to his personal representatives.
>
> (3) Where it appears from a will that at the time it was made the testator was expecting to be married to a particular person and that he intended that the will should not be revoked by the marriage, the will shall not be revoked by his marriage to that person.
>
> (4) Where it appears from a will that at the time it was made the testator was expecting to be married to a particular person and that he intended that a disposition in the will should not be revoked by his marriage to that person, —
>
> (a) that disposition shall take effect not withstanding the marriage; and
>
> (b) any other disposition in the will shall take effect also, unless it appears from the will that the testator intended the disposition to be revoked by the marriage.

[76] [1941] V.L.R. 60.

[77] [1936] P. 43.

[78] *Burton* v. *McGregor*, [1953] N.Z.L.R. 487; *In the Estate of Langston*, [1953] P. 100; *In the Will of Foss*, [1973] N.S.W.L.R. 180.

[79] *Sallis* v. *Jones*, [1936] P. 43; *In the Estate of Langston*, *ibid*. *Pilot* v. *Gainfort*, [1931] P. 103.

[80] *Ibid*.

[81] (1969) 69 W.W.R. 765 (B.C.S.C.).

[82] *See Theobald on Wills*, (13th ed., 1971) 144.

[83] *The Canadian Law of Wills: Probate*, (1976), 79.

[84] *Ibid*. 79, n. 27.

[85] Ibid. 79.

These kinds of problems arise in part from the wording used to create the exception. The word "contemplation" denotes a clear intention to marry. The exception, however, is designed to ensure that the will adequately protects the surviving spouse. Marriage constitutes a significant change in circumstances. In most cases a will made before marriage will not be satisfactory with respect to changed circumstances after marriage.

In some cases marriage will not alter the circumstances at all. For example, two people living together in a common law relationship may consider themselves to be married. They make wills benefiting each other. Subsequently, they marry. Their wills are still adequate since the marriage has not changed their circumstances. Nevertheless, their wills are revoked.[86] In *In the Estate of Gray*[87] the marriage, unknown to the wife, was void for the husband's bigamy. Their subsequent valid marriage revoked their wills. Their wills could not have been made in contemplation of marriage. The wife thought she was already married. The husband, who concealed his bigamy from his wife, was unlikely to tell her the truth and go through a second marriage with her.

One option for reform is to revoke only those wills which are inappropriate for circumstances prevailing after the marriage. This option does not provide any degree of certainty in determining whether a will has been revoked, and consequently we do not favour it.

Another option is to provide that the will is not revoked if the will as a whole, or any term of the will, indicates an intent that the will be effective notwithstanding an unspecified marriage. One problem not answered by this approach is where the testator makes a will in contemplation of marriage to A, but subsequently marries B. In that case the will should be revoked. It is difficult to escape the need that the intent to marry be with respect to the marriage that actually takes place.

A will made in contemplation of a marriage to a person the testator does not marry is functionally different from a will made in contemplation of any marriage. Presently, a will made in contemplation of any marriage will be revoked by a subsequent marriage. The testator, however, may have specifically directed his mind to the possibility of marriage. There should be some means whereby a will can survive a subsequent marriage. The thrust of section 15 is that marriage constitutes a significant change in circumstances to which the testator should direct his mind. It is, in part, based upon an assumption that the testator did not intend his will to have any effect after marriage. That assumption may be true or false. An exception, therefore, should be made where the testator specifically provides that his will be effective notwithstanding any marriage whatsoever. The policy that marriage constitutes a significant change in circumstances to which the testator should direct his mind is not offended by permitting a testator to direct that a will should survive any marriage. A direction that the will is made in contemplation of marriage to A, and the testator subsequently marries B, would not satisfy this exception. In that case the testator contemplated a specific marriage that did not take place.

Nova Scotia and Ontario have adopted another approach. Their legislation provides that the surviving spouse may elect to take under the revoked will. That election does not revive the will itself. Only those provisions respecting the surviving spouse are affected. The remainder of the estate will still pass on an intestacy. A right of election may serve a useful purpose. We

[86] *See, e.g., Re Taylor*, [1949] V.L.R. 201.
[87] (1963) 107 S.J. 156.

concluded earlier that the rights of the surviving spouse should be paramount in relation to those of other next-of-kin. The right to elect, presumably, would only be exercised when the will would benefit the surviving spouse more than an intestacy would. The result of an election would be a reduction in the interests of the deceased's children's intestate share. Whether it is desirable to give the spouse that discretion is open to question, when, if Recommendation 1 is adopted, the courts can vary intestate succession as may be fair in the circumstances. We are not persuaded that this approach need be adopted in British Columbia.

Our conclusion is that the general thrust of the exception to section 15, that a will is not revoked if it is made in contemplation of a marriage that takes place, is satisfactory. The section should be modified so that the courts have some flexibility in determining whether the will is made in contemplation of that marriage. Moreover, a testator should be able to direct that no marriage can revoke his will. Beyond that, any concerns are answered by our recommendations with respect to increasing the spouse's intestate share, extending *Wills Variation Act* principles to intestacies, and permitting beneficiaries of a will disinherited by operation of section 15 to apply under *Wills Variation Act* legislation. For example, if a person makes a will benefitting someone he subsequently marries, unless the will is made in contemplation of that marriage, or marriage generally, it will be revoked. Nevertheless, the surviving spouse and beneficiary of the revoked will should be adequately protected by operation of intestate succession, and eligibility to apply under the *Wills Variation Act*.

A restriction on this option, which we have considered, is whether the exception for a will the testator directs is to survive any marriage should be subject to a time limit. Circumstances may change very rapidly, and the testator may no longer wish his will to survive a subsequent marriage. Providing that a direction that the will survives any marriage is subject to a one or two year limitation would ensure that the testator reconsidered that issue from time to time with reference to prevailing circumstances. In the Working Paper we invited comment on this issue. Those of our correspondents who agreed that a testator should be able to make a will which would survive a subsequent marriage felt that there was no need for such a direction to be limited in time. We have concluded that a restriction of that kind is not necessary.

The Commission recommends:

23. That section 15 (a) of the Wills Act *be amended to provide*

(a) that a will is not revoked by the marriage of the testator where the will as a whole, or any term of the will, indicates an intention that the will be effective notwithstanding the marriage.

(b) that a will is not revoked by the marriage of the testator where the will as a whole, or any term of the will, indicates an intention that the will be effective notwithstanding any marriage other than a specific marriage that did not take place.

F. Revocation of Designations

1. Generally

There are many kinds of funds or plans under which a person may, *inter vivos* or by will, designate a beneficiary. These include life and accident insurance plans, RRSP's, RHOSP's, and various other kinds of plans, which are frequently related to the person's employment. We noted in our Report No.

52, The Making and Revocation of Wills, that in smaller estates often the proceeds payable under these plans will exceed the balance of the testator's estate. We made recommendations designed to bring the rules relating to these plans into uniformity. We also made recommendations respecting the enactment of legislation to permit participants in plans, other than those to which the *Insurance Act* applies, to name beneficiaries in a convenient and consistent manner based upon the model *Uniform Retirement Plan Beneficiaries Act ("URPBA")* prepared by the Uniform Law Conference of Canada. We deferred making any recommendation on the narrow issue of whether designations of beneficiaries of these plans should be revoked by operation of law. In our opinion, it was inappropriate to make any decision respecting this issue until we had an opportunity to consider revision of British Columbia dependant's relief legislation.

2. Revocation of Designations and Section 15 of the Wills Act

Both the *URPBA* and the *Insurance Act* provide that a designation contained in a will is revoked if the will is revoked by operation of law, while a designation *inter vivos* is not. Section 46 of the *Law and Equity Act* provides that designations made under RRSP's and RHOSP's are governed by the same rules respecting designations under the *Insurance Act*.

Whether designations should be revoked by operation of law raises issues similar to those raised by the question of whether a will should be revoked by operation of law. For reasons referred to earlier, a majority of the Commission has concluded that wills should continue to be revoked by marriage. Following from that decision, the same majority prefers a scheme whereunder both testamentary and *inter vivos* designations are revoked by marriage.

Inter vivos beneficiary designations and beneficiary designations by will differ from testamentary dispositions in that the monies affected are not part of the deceased's estate for the purposes of the *Wills Variation Act*. Consequently, if the deceased has not altered his affairs to accommodate changed circumstances, the courts will be powerless to protect the deceased's "new" family, unless the designation is revoked and the monies affected brought into the testator's estate. This difference provides all the more reason for revoking beneficiary designations made by the deceased upon his subsequent marriage.

The effect of revocation of a designation by operation of law is to bring the monies from the fund, plan or policy into the testator's estate, to be distributed pursuant either to his will, intestate succession, or order of the court. An alternative approach is to grant the courts power to make orders out of these monies, in appropriate circumstances, notwithstanding they do not constitute part of the estate. Such a power would avoid the necessity of revoking beneficiary designations by operation of law.

With respect to designations of beneficiaries of insurance and pension plans, we are advised that it is not uncommon for the deceased to neglect to change the designation upon marriage. One of our correspondents writes:

> I am writing to bring to your attention a specific problem . . . which will continue to go unanswered until legislation provides a remedy.
> The problem is that there is no discretion in any court which might give a widow any of the proceeds of a (group) life insurance policy on her husband. The extreme example, which is a slightly embellished version of a "case" which we received last year, is as follows:
> An unmarried man in his early 20's starts working in the forestry industry, and designates his alcoholic father as beneficiary on his group life insurance policy. Five years later he marries, has a child, purchases a mobile home and other assets on credit, and then dies leaving his wife with substantial debts and no significant

assets. Insurance proceeds of at least $25,000 are payable to the father, and the widow has absolutely no claim to them.

There is no particular reason to believe that the foregoing type of problem is likely to decrease in incidence, and the current result is clearly unsatisfactory from virtually every point of view, except possibly that of insurance companies which have the certainty of knowing who the beneficiary is.

A recent Manitoba case reveals another aspect of the problem. In *Re Hart and Public Trustee*,[88] the deceased purchased an insurance policy on his life in favour of his daughter. Subsequently he had another daughter, but neglected to change the beneficiary designation on his policy. Upon his death, his wife applied to have the beneficiaries changed on the life insurance policy, alleging that the father loved his children equally and did not intend to prefer one over the other. The court was powerless to alter the beneficiary designation.

If this is a recurring problem, limited court power to intervene may serve a beneficial function. For example, the courts could be empowered to make orders under dependant's relief legislation out of monies from insurance or pension funds where,

(i) the beneficiary was designated before the testator's marriage; or

(ii) the beneficiary was designated before the occurrence of significant changes in the testator's estate or his circumstances.

We discussed earlier the court's powers to make orders out of the estate of the deceased. We noted that there are various means a testator may adopt to avoid dependant's relief legislation. We discussed various legislative solutions, known as "anti-avoidance" legislation, which would prevent a testator from evading the Act. Our conclusion not to recommend anti-avoidance legislation was based upon a reluctance to interfere with settled affairs. Additionally, the chance that a deceased will attempt to avoid dependant's relief legislation did not justify legislative response of the complicated nature necessary to prevent avoidance. For those reasons we do not favour permitting the courts to make orders under the *Wills Variation Act* out of property which is not part of the estate.

We have concluded that beneficiary designations made by the deceased should be revoked by his subsequent marriage. In order to parallel the proposals we made respecting revocation of wills on marriage, if the designation is made in contemplation of a specific marriage which takes place, or of any marriage, the designation should survive. If the beneficiary of the fund, plan or policy has given consideration for his designation, he should be protected to the extent that he has given consideration.

We are concerned that the exception to revocation on marriage might become standard boiler plate in insurance policies and pension plans. That would defeat the purpose of the exception, since its basis is that the insured or participant has fully considered the effect of a subsequent marriage and concluded that it should not alter the disposition of the proceeds of the policy or plan. One alternative is to provide that the exception does not apply if it appears that the insured or participant did not fully consider or understand what effect a subsequent marriage might or should have. Another approach, if it appears that the exception is being abused, is to empower the superintendent to regulate these provisions. In the Working Paper we invited comment on whether some kind of legislative restriction on the use of this exception is desirable, but received no submission on that point.

We are also concerned that revoking designations in order that proceeds fall into the estate may permit creditors of the deceased to execute against

[88] (1981) 8 A.C.W.S. (2d) 483 (Man. Q.B.).

those proceeds.[89] It is not appropriate in the context of this Report to consider issues respecting exigibility. Those issues should be considered in the context of the law of execution generally. We have tentatively concluded that, at least for the present, proceeds of plans which are presently exempt from execution should remain exempt if a beneficiary designation is revoked by operation of law and those proceeds fall into the estate. It should be observed that one submission on the Working Paper favoured permitting proceeds to be exigible by creditors.

We do not think that irrevocable designations should be affected by operation of law. In our Report on Making and Revocation of Wills, we recommended that irrevocable designations which can be made for beneficiaries of life insurance policies under section 142 of the *Insurance Act* should be possible for accident or sickness insurance policies, as well as for pension plans.[90] Our recommendations respecting revocation of beneficiary designations by operation of law should be subject to section 142 of the *Insurance Act* as well as to legislation extending that principle to other kinds of insurance policies and plans.

It should be observed that a preferred beneficiary designation would be subject to revocation by subsequent marriage. Very few preferred beneficiary designations are to be found since they could only be made before the 1962 revision of the *Insurance Act*. We have concluded that a preferred beneficiary designation should be revoked by an insured's subsequent marriage.

Revocation of a beneficiary designation causes some problems of transition or application. Should legislation enacting these recommendations be retrospective? We are concerned that people affected by such legislation should be able to arrange their affairs accordingly. The policy underlying these recommendations, however, is that the result they dictate is fair in most circumstances. Consequently, we have concluded that they should apply to beneficiary designations whenever made, but only where the insured or participant's marriage takes place after legislation enacting these recommendations is proclaimed to be in force.

Lastly, two of our correspondents objected to this approach on the ground that insurance legislation should be uniform across Canada. We agree that uniformity is desirable. Nevertheless, we are convinced that this approach is desirable in British Columbia, since it would achieve more just results in practice, as well as produce internal consistency in British Columbia with respect to revocation by operation of law. Nation-wide uniformity is undesirable if the cost is internal inconsistency in provincial laws.

It should be recognized, of course, that in insurance legislation, a remarkable degree of uniformity has been achieved across Canada. Changes in insurance law tend not to be made unless adopted by the Association of Superintendents of Insurance. One of our correspondents wrote:

> Consequently, we urge that the Proposals of the Commission, which bear upon life and health insurance beneficiary designations, should be directed to and handled by the Association of Superintendents of Insurance in its continuing review of the uniform legislation. We believe this to be of paramount importance. It is for the Superintendents to consider the merits of the Commission's Proposals and, after consultation with the Commission, the life and health industry and other interested parties, to recommend uniform revision legislation to the provincial legislatures.

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[89] Under the current *Insurance Act*, R.S.B.C. 1979, c. 200, for example, insurance proceeds are not subject to claims of creditors of the insured: section 201.

[90] Recommendation 19.

We believe that Recommendations 24 and 25 (which follow), are of sufficient importance to be acted on unilaterally. If that course is not adopted, however, these recommendations should be brought before the Association of Superintendents of Insurance.

The Commission recomends:

24. That legislation be enacted to embody the following principles:

(a) That a beneficiary designation, other than an irrevocable designation, is revoked by the marriage of the insured under an insurance policy or of the participant under a plan, except where

(i) the document in which the designation is made, or any term of the document, indicates an intent that the designation be effective notwithstanding the marriage; or

(ii) the document in which the designation is made, or any term of the document, indicates an intent that the designation be effective notwithstanding any marriage other than a specific marriage that did not take place.

(b) If a beneficiary designation is revoked by paragraph (a), all interest of the beneficiary under the insurance policy or under the plan passes directly to the insured or participant or, if he is deceased, to persons among whom and in the shares in which the proceeds would have been divisible if the insured or participant had died intestate without debts.

(c) Proceeds of an insurance policy or of a plan which are not available to creditors of the estate before a revocation of a beneficiary designation are not available to those creditors after that revocation.

(d) Legislation enacting these recommendations should apply only where the insured or participant marries after its proclamation.

(e) Until the insurer or the administrator of a plan receives at any of its offices in Canada notice in writing of the marriage, it may deal with the proceeds in the same manner and with the same effect as if no marriage had taken place.

(f) Nothing in paragraph (e) should affect the right of any person entitled to payment by virtue of such marriage to recover from any person to whom payment is made by the insurer or the administrator of a plan.

3. Revocation of Designations and Section 16 of the Wills Act

A related question is whether the principle of section 16 of the *Wills Act* should be extended to beneficiary designations. Should a beneficiary designation in favour of a spouse be revoked when the deceased makes a separation agreement with his spouse, or by the termination of his marriage with the designated beneficiary by declaration of nullity or decree of divorce?

The British *Columbia Insurance Act*[91] once provided that a designation in favour of a spouse was revoked by divorce:

> **151.** (1) Where the wife or husband of the person whose life is insured is designated as beneficiary, and is subsequently divorced, all interest of the beneficiary under the policy shall pass to the insured or his estate, unless such beneficiary is a beneficiary for value or an assignee for value.

[91] R.S.B.C. 1960, c. 197.

(2) Where a divorce has been granted on the application of the beneficiary, the beneficiary is estopped from denying the validity of the divorce for the purpose of this section.

(3) Until the insurer receives at its head or principal office in Canada notice in writing of the Act of Parliament, judgment, decree, or order granting the divorce, it may deal with the insurance-money in the same manner and with the same effect as if no divorce had been granted, and before paying the insurance-money the insurer is entitled to receive the original judgment, order, or decree, or a duly verified copy thereof printed by the Queen's Printer, as the case may be.

(4) Nothing in subsection (3) shall affect the right of any person entitled to payment by virtue of such divorce to recover from any person to whom payment is made by the insurer.

That section was enacted in 1923[92] and repealed in 1962.[93] The word "divorce" was judicially interpreted to have a broad meaning. It included separation[94] and annulment.[95] It is difficult to determine why the section was repealed. Perhaps, administratively, it caused insurance companies difficulties. Reported cases do not indicate other problems arising from its application. Generally, on the facts of reported cases, it would appear that the section achieved beneficial results.

Another possible explanation is that it was felt that a beneficiary designation in favour of a spouse should not be revoked by divorce since a gift in a will to a spouse was not revoked by divorce. The legislation which repealed section 151 also enacted what are now sections 143 (3) and 196 (4) of the *Insurance Act*, which provided that a designation contained in a will is revoked if the will itself is revoked by operation of law or otherwise.[96] Obviously, at that time, efforts were made to rationalize the rules which applied to revocation.

Because of the enactment of section 16 of the *Wills Act*, it is necessary to consider again whether that policy decision should be continued with respect to proceeds of insurance policies and pension plans. Moreover, at the time section 151 was repealed, matrimonial property legislation, which makes revocation of a beneficiary designation in favour of a spouse upon divorce desirable, had not been enacted in British Columbia.

The basis of section 16 of the *Wills Act* is that a gift to a surviving spouse should be revoked because the surviving spouse is already protected under the *Family Relations Act*. Because many, if not most, people are unaware of the significance of the *Family Relations Act* provisions relating to family assets, it is a wise precaution to revoke gifts to the surviving spouse in the testator's will once the surviving spouse has become entitled to an interest in family assets.[97]

The philosophy underlying the current section 15 of the *Wills Act* is to protect the new spouse and children of the deceased. Section 16 serves a different function. It ensures that the surviving spouse is not benefited twice. In a sense it prevents "over-protection."

It is possible that an insurance policy, or pension plan, may be characterized as a family asset.[98] In the events contemplated by section 16, the surviving spouse may already be entitled to a one-half interest in these funds. It follows then that, in the absence of a contrary direction, a designation in a

[92] S.B.C. 1923, c. 27, s. 32.

[93] S.B.C. 1962, c. 29, s. 3.

[94] *Re Stephenson*, [1945] O.W.N. 821 (H.C.).

[95] *Re Miles*, [1951] O.R. 647, [1951] 4 D.L.R. 359 (C.A.), but not termination of a marriage void *ab initio*: *Re Isaacs*, [1954] O.R. 647, 942 (C.A.); *see* J.D. Honsberger, *Case and Comment*, (1955) 33 Can. B. Rev. 1070.

[96] S.B.C. 1962, c. 29, s. 3, "s. 135."

[97] *See, e.g., Gagne v. Anderson*, (Unreported Que. C.A. decision), (1982) 13 A.C.W.S. (2d) 293.

[98] *Rutherford* v. *Rutherford*, [1981] 6 W.W.R. 485 (B.C.C.A.).

policy in the surviving spouse's favour should be revoked with the testator's will, or again the surviving spouse will receive too much.

In *Re Fiorentino*,[99] the surviving spouse was the beneficiary of the deceased's pension plan. They had separated in 1959, at which time they entered into a separation agreement which purported to determine all the rights between them. The deceased died in 1980. He never changed the beneficiary designation of the pension plan, but purported to bequeath that interest in his will to his sister. It was held that the surviving spouse was entitled to the pension funds.

For reasons canvassed in the previous section, we have concluded that legislation enacting these recommendations should be retrospective in that they should govern beneficiary designations whenever made, but only where the surviving spouse's succession rights have been revoked after that legislation is proclaimed to be in force.

Concerns similar to these expressed concerning Recommendation 24 were raised by our correspondents with respect to this approach. On the issue of uniformity, we remain convinced that achieving both fair results and consistency in British Columbia law is paramount to concerns of national uniformity.

The Commission recommends:

25. *That legislation be enacted to embody the following principles:*
    - *(a) That subject to a contrary intention contained in the insurance policy, or the plan in which the designation is made, or in an instrument or court order respecting matrimonial property interests, if there has been a deemed lapse of a spouse's succession rights to take under the deceased's will by [Recommendation 19] or intestate succession by [Recommendation 20], any designation in a policy or plan owned by the deceased in the spouse's favour should be revoked.*
    - *(b) If a beneficiary designation is revoked by paragraph (a), subject to a contrary intention all interest of the beneficiary under the insurance policy or under the plan pass directly to the insured or participant or, if he is deceased, to the persons among whom and in the shares in which the proceeds would have been divisible if the insured or participant had died intestate without debts.*
    - *(c) Proceeds of an insurance policy or of a plan which are not available to creditors of the estate before a revocation of a beneficiary designation are not available to those creditors after that revocation.*
    - *(d) Legislation enacting these recommendations should apply only where a spouse's succession rights have been deemed to have lapsed after its proclamation.*
    - *(e) Until the insurer or the administrator of a plan receives at any of its offices in Canada notice in writing of the deemed lapse of a spouse's succession rights, it may deal with the proceeds in the same manner and with the same effect as if no revocation of a designation in a policy or plan in the spouse's favour had taken place.*
    - *(f) Nothing in paragraph (e) should affect the right of any person entitled to payment by virtue of such revocation of a designation*

[99] [1983] 4 W.W.R. 213 (Alta. Q.B.).

in a policy or plan in the spouse's favour to recover from any person to whom payment is made by the insurer or the administrator of the plan.

G. Homestead

Both the *Homestead Act*[100] and the *Land (Wife Protection) Act*[101] contain provisions respecting succession to the "homestead." The *Homestead Act* defines "homestead" to mean:[102]

> . . . land, whether leasehold or freehold, together with erections or buildings, with their rights, members and appurtenances, registered as a homestead; and an erection or building on a homestead, whether or not affixed to the soil, shall be taken to be land and part of the homestead.

The *Land (Wife Protection) Act* defines "homestead" to mean:[103]

> . . . land or any interest in it entitling the owner to possession of it which is registered in the records of the land title office in the name of the husband and on which there is a dwelling occupied by the husband and wife as their residence, or that has been so occupied within the period of one year immediately preceding the date of the making of the application under section 2.

Section 6 of the *Homestead Act* provides for the descent of a homestead on intestacy:

> **6.** (1) If any person holding a homestead dies intestate, leaving him surviving a widow and minor children, the homestead passes to the widow, to be held by her during the minority of the children, or while the widow remains unmarried.
>
> (2) The exempted property shall not be sold during the minority, or while the widow remains unmarried, to pay a debt contracted by the deceased person subsequent to the registration of the homestead.
>
> (3) If any person holding a homestead dies intestate
>
> (a) leaving a widow him surviving and no children, the widow is entitled to the homestead absolutely;
>
> (b) leaving children only him surviving and no widow, the property belongs to the children absolutely in equal shares divisible on the youngest child attaining 19 years.

There is some doubt as to the effect of this provision. The remainder of the Act protects the homestead from execution to a value of $2500. It is likely section 6 is also confined to the first $2500 of a homestead.

In an earlier report[104] on "Execution Against Land," we considered the effect of the *Homestead Act* with respect to execution and to intestacy. We observed that section 6 of the *Homestead Act* is inconsistent with the general law pertaining to intestacy and that the Act itself is seldom used. We concluded that the *Homestead Act* should be repealed. We have not departed from that conclusion.

Under section 2 of the *Land (Wife Protection) Act*, the wife or husband on her behalf may apply to the Land Title Registrar for an entry on the title that the homestead is subject to the Act.[105] Section 4 of the Act provides:

> **Application of Estate Administration Act**
>
> **4.** When an entry has been made on the title under section 2, section 90 (1) of the *Estate Administration Act* applies to the devolution of the homestead; but, notwithstanding any testamentary disposition or rule of law and subject to the liability of the land comprising the homestead for foreclosure or the payment of debts, the personal representative shall hold the homestead in trust for an estate for life of the married man's wife.

[100] R.S.B.C. 1979, c. 173.
[101] R.S.B.C. 1979, c. 223.
[102] Section 1.
[103] Section 1.
[104] (1978).
[105] Section 2.

If the wife is living apart from her husband at the time of his death, under circumstances which would disentitle her to alimony, the Act does not apply.[106] Similarly, the Act does not apply to a wife of a marriage ended by divorce or declaration of nullity.[107]

In our opinion, section 4 of the Act serves no useful purpose. On an intestacy, we have recommended the surviving spouse should be entitled to a significant share in the estate, which the surviving spouse may elect to appropriate against the matrimonial home. If her husband by will gives the homestead to another, the wife may apply for relief under the *Wills Variation Act*. If there is a break-up of the marriage, the rights of the spouses are governed by the *Family Relations Act*. We have concluded that the provisions of the *Land (Wife Protection) Act* respecting succession should be repealed.

The Commission recommends:

26. That the Land (Wife Protection) Act *be amended by repealing sections 4 and 5.*

[106] Section 5.
[107] Section 6.

CHAPTER V CONCLUSION

A. General

The recommendations we have made have been directed at three principal goals. First, we have made recommendations designed to bring provisions respecting intestate succession into step with contemporary needs and policies. To this end we have recommended, for example, increasing the intestate share of the surviving spouse and removing the bars against illegitimate children from taking under an intestacy. Second, we have attempted to consolidate, under one statute, the courts' jurisdiction to vary testamentary dispositions and intestate succession. Third, we have defined when a spouse's rights in property of a deceased spouse should be governed by either legislation respecting succession or by legislation respecting rights to family property. A spouse's entitlement will differ depending on whether he or she possesses rights to succession or to family property. It is important to clarify when these rights should arise to prevent a surviving spouse from becoming entitled to what may be overlapping, if not mutually inconsistent, rights to the deceased's estate.

In pursuing the last of these three goals, we have not made recommendations to reform those provisions of the *Family Relations Act* respecting rights to matrimonial property, beyond tentatively concluding that rights which have arisen *inter vivos* should survive the death of one spouse. The provisions of the *Family Relations Act* which deal with rights to matrimonial property represent a novel approach to resolving spousal rights. The courts should be given time to come to terms with these provisions, many of which are both complex and conceptually difficult. It is inappropriate at this time to consider reform of what is still largely untested legislation.

B. List of Recommendations

The following is a list of the recommendations we have made in this Report:

1. That the principles of the Wills Variation Act *should apply to intestate estates. (Page 23)*

2. (a) That section 96 of the Estate Administration Act *should be retained, subject only to the following amendments:*

(i) The Estate Administration Act *should be amended to provide that the surviving spouse's preferred share be $200,000 or such other greater amount prescribed by the Lieutenant Governor in Council.*

(ii) The Lieutenant Governor in Council be given the power to increase by regulation the amount of the surviving spouse's preferred share.

(iii) If the deceased is survived by one or more children or their issue, the spouse is entitled to one-half the residue of the estate.

(b) That the Lieutenant Governor in Council regularly review the adequacy of the surviving spouse's preferred share, and in any event, no less often than every five years from implementation. [*Note: These recommendations are subject to Recommendation 1.] *(Page 28)*

3. That for the purposes of intestate succession, when determining kindred relationships, no distinction should be made between children of married or unmarried parents. (Page 30)

4. That sections 85 to 89 of the Estate Administration Act *be repealed. (Page 33)*

5. (a) That the Estate Administration Act *be amended to provide that next-of-kin more distant than the fourth degree of consanguinity to the deceased should not be permitted to share in the deceased's estate upon an intestacy.*

(b) Paragraph (a) does not prejudice the right of

(i) issue of the deceased to succeed on an intestacy, or

(ii) a person to apply under the Escheat Act *on the basis of a legal or moral claim upon the former owner of an estate that has escheated to the Crown. (Page 37)*

6. That the doctrine of hotchpot should not apply to intestacies. The Estate Administration Act *should be amended by repealing section 105. (Page 68)*

7. (1) Sections 108 and 109 of the Estate Administration Act *be repealed.*

(2) (a) The household furnishings should go to the surviving spouse;

(b) "household furnishings" in (2)(a) means chattels usually associated with the enjoyment by the spouses of the matrimonial home, including the family automobile. (Page 41)

8. Legislation be enacted to implement the following principles:

(a) The surviving spouse may elect to appropriate his or her share of the estate first against the matrimonial home.

(b) Notice to the surviving spouse of the right to elect should be given with the application for letters of administration.

(c) The election is exercised by giving notice in writing to the administrator and to the deceased's issue entitled to share in the intestacy.

(d) The notice of election must place a value on the deceased's interest in the matrimonial home.

(e) Unless the value placed on the deceased's interest in the matrimonial home is agreed to by the deceased's issue entitled to share in the intestacy, and their written consents obtained, the administrator must apply to the court for an order as to the value of the deceased's interest in the matrimonial home.

(f) The right to elect may be exercised until one year has elapsed from the death of the deceased unless the court shall, before or after the expiration of the year, extend the time in which the election may be exercised.

(g) The value placed on the deceased's interest in the matrimonial home is to be determined as at the date immediately preceding the deceased's death.

(h) If the value of the deceased's interest in the matrimonial home exceeds the surviving spouse's share in the estate, the surviving spouse may elect to purchase the remaining interest from the estate, or from those in whom that interest beneficially vests, in accordance with its valuation under the election.

(i) The surviving spouse may make these elections even if he or she is the deceased's personal representative, notwithstanding the rule that a trustee may not purchase trust property.

(j) If the surviving spouse is the deceased's representative, there is no requirement that the surviving spouse serve notice of the right to elect or of the election on the surviving spouse. (Pages 43-44)

9. That the basis of the courts' jurisdiction to make an order under the Wills Variation Act *should not be changed. (Page 78)*

10. (1) That the Wills Variation Act *be amended to permit the following persons who survived the deceased to apply:*

(a) spouse;

(b) a person whose marriage to the deceased was terminated or declared a nullity if receiving or entitled to receive maintenance from the deceased;

(c) common law spouse who, immediately preceding the death of the deceased,

(i) was cohabiting with the deceased for not less than two years, or

(ii) was receiving or entitled to receive maintenance, pursuant to the Family Relations Act, *from the deceased;*

(d) the deceased's children, posthumous children, and stepchildren;

(2) That the Wills Variation Act *be amended to permit the following persons to apply if they were dependent on the deceased immediately prior to his death:*

(a) grandchildren;

(b) grandparents;

(c) parents;

(d) brothers, sisters, half-brothers and half-sisters.

(3) For the purposes of paragraphs (1) and (2), when determining relationships to the deceased, no distinction should be made between children of married or unmarried parents. (Pages 88-89)

11. That the Wills Variation Act *be amended to direct the courts to determine the adequacy of the testator's provision for the applicant as at the date of the hearing. (Page 91)*

12. That the Wills Variation Act *be amended to provide that the court shall have regard to and may hear evidence respecting the value or the composition of the assets of the estate or part of the estate as at the date of the hearing. (Page 91)*

13. That the Wills Variation Act *be amended by deleting section 10 and adding a section comparable to the following:*

(1) An action shall not be heard by the court at the instance of a party claiming the benefit of the Act unless, within six months from the entry of the grant of letters probate or the grant of administration in the court registry in the province, or the resealing in the province of a grant of letters probate or administration,

(a) the action is commenced; and

(b) the writ of summons commencing the action is served on the deceased's personal representative, or notice of the action is filed in the court registry in which the probate proceedings are commenced. (Page 94)

14. That the Wills Variation Act *be amended to permit an application to be brought on behalf of a posthumous child before birth. (Page 95)*

15. That the courts should have power to make interim awards to an applicant who is in immediate need of financial assistance. (Page 98)

16. That the application for interim support may be heard upon service of the deceased's personal representative, with leave of the court, or on such other terms as the court may see fit. (Page 98)

17. Section 3 of the Wills Variation Act *be revised by deleting from it ". . . may attach the conditions to the order that it thinks fit, or . . ." (Page 101)*

18. The Wills Variation Act *be revised to provide that:*

(1) The court may attach such conditions to an order as it thinks fit.

(2) Provision may be made out of income or capital or both.

(3) An order may be made

(a) for the benefit of an individual; or

(b) to a trustee on behalf of a defined class in which all members are ascertained.

(4) An order may provide for a lump sum payment, periodic payments by the purchase of an annuity or otherwise, or the transfer of specific property.

(5) A lump sum may be held in trust and payments made from income or capital or both, as the court may direct.

(6) Periodic payments may be for an indefinite or limited period, or until the happening of a specified event.

(7) Specific property may be transferred to, or held in trust for the benefit of an applicant, absolutely, for life, for a term of years, or until the happening of a specified event.

(8) An order may be secured by a charge on property or otherwise. (Pages 101-102)

19. That section 16 be amended, in language comparable to the following, to provide:

16. (1) Where in a will a testator:

(a) gives an interest in property to his spouse,

(b) appoints his spouse executor or trustee, or

(c) confers a general or special power of appointment on his spouse and after the making of the will a property division has been made by the testator in favour of the other spouse, or the other spouse becomes entitled to an interest in family assets under the Family Relations Act, *R.S.B.C. 1979, c. 20, subject to a contrary intention contained in the will or an instrument respecting matrimonial property interests, the will takes effect as if the spouse had predeceased the testator.*

(2) In this section "spouse" includes a person whose marriage to the testator was terminated or declared a nullity.

(3) In this section, "a property division" is an arrangement between the spouses concerning the division of their property which is intended by them, or appears to have been intended by them, to separate and finalize their affairs, in recognition of their marital break-up.

(4) Subsection (1) does not apply to a spouse who reconciled with the testator, if the reconciliation was subsisting at the time of the testator's death.

(5) This section does not prohibit an application by the surviving spouse under the Wills Variation Act.

(6) This section does not apply to testamentary gifts to a beneficiary other than the spouse of a limited estate based upon the life of the spouse. (Page 111)

20. (1) That section 111 of the Estate Administration Act *be repealed.*

(2) That the Estate Administration Act *be amended to provide, in language comparable to the following, that:*

(a) Subject to a contrary intention contained in an instrument respecting matrimonial property interests, if before the death of a spouse, a surviving spouse becomes entitled to an interest in family assets under the Family Relations Act, *or the deceased has made a property division in favour of the surviving spouse, in the event of an intestacy, the deceased's estate be distributed as if the surviving spouse predeceased the deceased.*

(b) In subsection 2 (a), "a property division" is an arrangement between the spouses concerning the division of their property which is intended by them, or appears to have been intended by them, to separate and finalize their affairs, in recognition of their marital break-up.

(c) Subsection 2 (a) does not apply to a spouse who reconciled with the deceased, if the reconciliation was subsisting at the time of the deceased's death.

(d) This section does not prohibit an application by the surviving spouse under the Wills Variation Act. *(Page 117)*

21. That section 15 of the Wills Act *should not be repealed. (Page 133)*

22. That beneficiaries of a will revoked by section 15 of the Wills Act *should be permitted to apply under the* Wills Variation Act *for a share of the intestate's estate. (Page 133)*

23. That section 15 (a) of the Wills Act *be amended to provide*

(a) that a will is not revoked by the marriage of the testator where the will as a whole, or any term of the will, indicates an intention that the will be effective notwithstanding the marriage.

(b) that a will is not revoked by the marriage of the testator where the will as a whole, or any term of the will, indicates an intention that the will be effective notwithstanding any marriage other than a specific marriage that did not take place. (Page 136)

24. That legislation be enacted to embody the following principles:

(a) That a beneficiary designation, other than an irrevocable designation, is revoked by the marriage of the insured under an insurance policy or of the participant under a plan, except where

(i) the document in which the designation is made, or any term of the document, indicates an intent that the designation be effective notwithstanding the marriage; or

(ii) the document in which the designation is made, or any term of the document, indicates an intent that the designation be effective notwithstanding any marriage other than a specific marriage that did not take place.

(b) If a beneficiary designation is revoked by paragraph (a), all interest of the beneficiary under the insurance policy or under the plan passes directly to the insured or participant or, if he is deceased, to persons among whom and in the shares in which

the proceeds would have been divisible if the insured or participant had died intestate without debts.

(c) Proceeds of an insurance policy or of a plan which are not available to creditors of the estate before a revocation of a beneficiary designation are not available to those creditors after that revocation.

(d) Legislation enacting these recommendations should apply only where the insured or participant marries after its proclamation.

(e) Until the insurer or the administrator of a plan receives at any of its offices in Canada notice in writing of the marriage, it may deal with the proceeds in the same manner and with the same effect as if no marriage had taken place.

(f) Nothing in paragraph (e) should affect the right of any person entitled to payment by virtue of such marriage to recover from any person to whom payment is made by the insurer or the administrator of a plan. (Page 140)

25. That legislation be enacted to embody the following principles:

(a) That subject to a contrary intention contained in the insurance policy, or the plan in which the designation is made, or in an instrument or court order respecting matrimonial property interests, if there has been a deemed lapse of a spouse's succession rights to take under the deceased's will by [Recommendation 19] or intestate succession by [Recommendation 20], any designation in a policy or plan owned by the deceased in the spouse's favour should be revoked.

(b) If a beneficiary designation is revoked by paragraph (a), subject to a contrary intention all interest of the beneficiary under the insurance policy or under the plan pass directly to the insured or participant or, if he is deceased, to the persons among whom and in the shares in which the proceeds would have been divisible if the insured or participant had died intestate without debts.

(c) Proceeds of an insurance policy or of a plan which are not available to creditors of the estate before a revocation of a beneficiary designation are not available to those creditors after that revocation.

(d) Legislation enacting these recommendations should apply only where a spouse's succession rights have been deemed to have lapsed after its proclamation.

(e) Until the insurer or the administrator of a plan receives at any of its offices in Canada notice in writing of the deemed lapse of a spouse's succession rights, it may deal with the proceeds in the same manner and with the same effect as if no revocation of a designation in a policy or plan in the spouse's favour had taken place.

(f) Nothing in paragraph (e) should affect the right of any person entitled to payment by virtue of such revocation of a designation in a policy or plan in the spouse's favour to recover from any person to whom payment is made by the insurer or the administrator of the plan. (Pages 142-143)

26. That the Land (Wife Protection) Act *be amended by repealing sections 4 and 5. (Page 144)*

C. Acknowledgments

The Commission would like to express its gratitude to a number of persons who have contributed to the Report. First, we would like to thank those who responded to the Working Paper which preceded this Report. Many of those responses were detailed and lengthy, involving careful consideration of the Working Paper and our proposals. We are indebted to our correspondents, who volunteered their expertise and a significant amount of their time to comment on our work.

We would also like to thank the members of the Vancouver Wills and Trusts Subsection of the Canadian Bar Association. The contents of the Working Paper were fully and energetically debated at two meetings of the subsection, and their interest in the work of the Commission is very much appreciated.

There are three individuals to whom we are particularly indebted. Mr. Jack Scott-Harston, Q.C. acted as consultant on this project and gave us the benefit of his many years of experience. The final recommendations are, of course, the Commission's own. Messrs. Peter Fraser and Ken Mackenzie, both former members of the Commission, participated in the development of the Working Paper. Mr. Mackenzie also participated in the deliberations on our final recommendations. His term as a Commissioner expired only shortly before the contents of this Report were settled.

We would also like to express our gratitude to two members of the Commission's staff. Mr. Frederick W. Hansford was involved in the initial stages of this project, and the Working Paper and this Report drew heavily on his research. Mr. Thomas G. Anderson, Counsel to the Commission, subject to the direction of the Commission, drafted the Working Paper and this Report.

JOHN S. AIKINS
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Commission member, Ronald I. Cheffins did not participate in the making of this Report.

December 15, 1983

RESERVATION BY ARTHUR L. CLOSE

A. Introduction

It is with a considerable measure of regret that I find myself in disagreement with the other members of the Commission on several of the issues considered in this Report and what, if any, reform measures are desirable to deal with them. In some cases, my views are adequately canvassed in the body of the Report as a "minority" position and no further comment is required. Two of these issues, however, are more fundamental and a more detailed treatment of the minority view is called for. That is the function of this reservation. The issues canvassed below are the basis of the court's exercise of its jurisdiction under the *Wills Variation Act* and the entitlement of a surviving spouse on an intestacy.

B. The Wills Variation Act

1. Freedom of Testation and its Limits

Freedom of testation is the right of a testator to dispose of his property as he sees fit. This right is one valued highly in our society. It is not, however, an absolute right which must invariably prevail over all other competing interests of society and there are numerous fetters on freedom of testation which are both desirable and justifiable. For example, a bequest in a will designed to promote something that would generally be regarded as a social evil, may be struck down as contrary to public policy.[1] There are numerous other examples of limitations designed to stem "evils" thought to flow from full freedom of testation.[2]

One such "evil" is the possibility that a testator might use this freedom to leave his or her dependants in needy circumstances. The public concern lies in the possibility that such persons may become a charge on the public purse or, even where the possibility of public assistance does not arise, that it is inhumane to require a testator's dependants to eke out an existence at a standard far below that which the testator permitted them to enjoy during his lifetime. Legislation such as the *Wills Variation Act* is society's response to this evil.

The precise nature of a testator's duty to his dependants is somewhat elusive but the phrase "adequate provision for the proper maintenance and support" of those dependants is as good an expression of it as any. Those are the words used in 2 (1) of the *Wills Variation Act* and a failure to make such provision triggers the court's jurisdiction under the Act. The statute is clearly remedial. It would be unremarkable but for the fact that the response of the courts in the exercise of their jurisdiction has gone well beyond the evil that the Act was designed to remedy. The result is that further fetters on freedom of testation have emerged which cannot be justified by the social policy of the statute and which leads to uncertainty and inconvenience in the administration of estates.

The source of the difficulty, as I perceive it, is that the courts, in exercising their jurisdiction under the *Wills Variation Act*, have shifted their focus from "proper maintenance and support." What has emerged is an inquiry into what, if any, "moral obligation" was owed by the testator to the applicant for relief. If the court finds such a moral obligation and concludes that the obligation was not satisfied either by the will or by the testator during

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[1] *See In re Millar Estate*, [1938] S.C.R. 1, particularly the judgment of Crocket J.

[2] *E.g.* the rules against perpetuities and accumulations.

his lifetime, and if there are assets available to satisfy the obligation, it is likely that the court will exercise its discretion in favour of the applicant. It will do so even where it is clear that the applicant is an adult who enjoys a comfortable lifestyle and was not dependent on the testator.

A majority of the Commission approves of the approach presently taken by the courts and recommend no change. It is here that we part company. I suggest there are a number of objectionable features to the moral obligation approach.

2. Defects of the Present Approach

(a) *The Present Approach Leads to Uncertainty*

Whether or not one person owes a moral obligation to another, and the extent and nature of that obligation is almost wholly a subjective matter. Given any particular fact situation, views may vary widely among judges, lawyers, potential testators and potential beneficiaries as to what, if any, moral obligation exists. On what basis is one view to be preferred to another?

In contrast, the notion of proper maintenance and support, while not free of difficulty, lends itself much more to an objective approach.

The adoption of a subjective approach to the *Wills Variation Act* means that the results of an application for relief become much less predictable. It is an invitation to litigate. Many more disappointed beneficiaries are likely to seek relief, hoping the court will find a moral obligation, than would be the case if the court's attention were focused on the more objective question of proper maintenance and support. Even unworthy claims which have a small chance of success are given an enhanced "nuisance value" with the result that executors may be under pressure to settle them. At best, the deceased's personal representative is less able to predict the outcome of litigation with certainty.

There are other undesirable aspects to this uncertainty. At the time a will is drawn, testators and those advising them cannot assume with confidence that a (perhaps complex) structure of testamentary dispositions will not fail simply because a judge identifies what he perceives to be a moral obligation which was not satisfied by the testator in his will.

So long as legislation such as the *Wills Variation Act* is maintained in any form, there can never be absolute certainty. Somewhat divergent views on what constitutes proper maintenance and support is inevitable. The prospects of certainty can, however, be greatly enhanced by a retreat from the subjective notion of moral obligation.

(b) *The Present Approach is Anomalous*

A second objection to the moral obligation test is that it is anomalous. Historically, the role of the courts has been to adjudicate on, and enforce, legal obligations. Questions of moral obligation have traditionally been left to theologians, philosophers and individual conscience. The training and experience of judges equips them to pronounce credibly on matters of legal obligation. It is difficult to identify any factor which makes a judge more competent than a testator to identify what that testator's moral obligations are and the extent to which they should be recognized.

A further anomaly lies in the restricted class of persons entitled to apply to the court for relief. It is restricted to the testator's spouse and children. While moral obligations are most commonly found within the family, they are by no means restricted to family relationships. A man may owe a moral obligation to his neighbor as easily as he might owe it to his child. But the neighbor is not entitled to apply for relief. If the concept of moral obligation

was really intended by the legislature to be the corner stone of the court's jurisdiction under the *Wills Variation Act*, surely the doors of the courthouse would have been thrown open to any person who could demonstrate a moral claim on the testator.

A final anomaly, I suggest, is the lack of symmetry between the rights which may be asserted against the testator before his death and those which may be asserted against his estate after his death. In respect of proper maintenance and support a degree of symmetry is obvious. A person is under a legal duty to support his or her spouse and minor children. If this duty is not observed then it may be enforced through the courts. That a testator's estate should, therefore, be charged with a duty similar to that borne by the testator in his lifetime is not troublesome.

To the extent that moral obligation transcends the question of proper maintenance and support, this symmetry vanishes. The courts will recognize and enforce claims against the testator's estate which could not have been asserted against the testator in his lifetime. The adult able-bodied child seeking his share of his parents' capital has no basis on which to assert a claim during his parents' lifetime. After his parents' death he may receive a sympathetic hearing. This lack of symmetry is sometimes justified with an argument along the lines of "while he is alive he may need it, but after he is dead the testator doesn't need it any more." This argument is not compelling. It could as easily be invoked to confiscate from a testator, during his lifetime, any wealth in excess of his needs.

(c) *Widespread Dissatisfaction With the Present Approach*

In my view, there is a further and more significant defect in the moral obligation approach to the *Wills Variation Act* and the broad judicial discretion which goes with it. I believe that it is fundamentally out of touch with what a majority of British Columbians think the law should be. This is a matter on which no public opinion surveys are available and, given the subtleties involved, it may be impossible to conduct an adequate survey. Nonetheless, the response to our Working Paper provides some indication of dissatisfaction with the present position.

In the Working Paper which preceded this Report the issue of the court's exercise of its discretion and the moral obligation approach was discussed. A majority of the Commission then, as now, endorsed the present position, but comment on the issue was specifically invited. The response was unanimous. Not a single person who responded to our Working Paper expressed approval of the way in which the courts presently exercise their jurisdiction under the *Wills Variation Act*. In other words, the moral obligation approach was unanimously rejected by our correspondents. While such matters are not to be determined solely by counting heads, neither, I believe, can this response be ignored. I perceive a call for fundamental change in the way the court's discretion is exercised under the *Wills Variation Act* and I believe this call is one to which a law reform agency should respond.[3]

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[3] Another indicator, for what it is worth, of public sentiment appeared as this reservation was being drafted. In a letter to the internationally syndicated advice columnist Ann Landers a person wrote to complain that her father, because he had taken a dislike to the writer's husband, "has cut me out of his will and is leaving everything to our children . . . . Is this fair?" Ann Landers' reply was as follows:

> Dear K.:
>
> Yes, it is fair. Parents don't owe their children an inheritance. Your Dad has the right to do as he pleases with his money.

Interestingly, the letter in question emanated from Kelowna, B.C. (Vancouver Sun, Tuesday, Aug. 9, 1983 at B3).

3. The Morris Case

Lest it be thought that I have overstated the extent to which the courts have adopted and used the moral obligation approach it is useful to examine the latest pronouncement of the British Columbia Court of Appeal concerning the rights of adult children under the *Wills Variation Act*. This is the decision in *Morris* v. *Morris*[4] and it emerged only after our Working Paper was circulated.

Morris v. *Morris* involved an application by two of four of the testator's adult children. The sole beneficiary under the will was the testator's spouse who was also the mother of the two children who were not applicants under the Act, the applicants being the children of a former marriage. The value of the estate was conservatively estimated at about $250,000. By operation of law the second wife also acquired about $170,000 and she had assets of her own totalling approximately $900,000.

The two applicants, David and Diana were aged 39 and 40 respectively. David was a lawyer with the Ministry of the Attorney General at an adequate salary. Diana was a freelance interior decorator who had been well educated in the arts. She was widowed and lived in an expensive area in London in a comfortable lifestyle. While she had not done as well financially as her siblings, it does not appear she was in need. The two children of the second marriage, who also received nothing under the will, but who did not join in the application, were both professionals with relatively high incomes.

At trial, the judge noted evidence that "no expense was spared in seeing that the applicant children were properly educated" and evidence that the testator felt that once those children were established he had discharged parental obligations. The trial judge declined to make an order under the Act.

The Court of Appeal reversed this decision and awarded David $50,000 and Diana $75,000 out of the estate. Two factors appear to have moved the Court of Appeal in arriving at this result.

First, it was felt that all the testator's children had not been treated equally. The court noted that during the testator's lifetime, capital had been advanced to the two younger children (the non-applicants who also, presumably, were educated at the testator's expense) of a value of approximately $79,000 each. The court appeared to conclude that the testator was under an obligation to treat his children equally and it was unfair that similar provision was not made either in the will or by the testator during his lifetime for the two applicant children. This aspect of the Court's reasoning is confusing. If the Court of Appeal is espousing a doctrine that a testator is under an obligation to treat all his children equally, it is difficult to see why dissimilar awards were made to the two applicants. Diana was awarded an amount approximately equal to the advances of capital made to the younger children. David received somewhat less.

A second factor stressed in the decision is the fact that the will was made in 1965 at a time when the testator had few assets. The suggestion is made that the testator failed to keep his will under review in the light of a significant increase in his assets after the will was made. "His failure was to revise his will to recognize the legitimate expectations of his other two children to share in his capital assets . . ."[5] This is difficult to reconcile with evidence that the testator reviewed his testamentary arrangements in the '70's during a time of marital difficulties and was content to leave the 1965 will (all to the wife)

[4] (1983) 14 E.T.R. 35.

[5] *Ibid.* at 60.

intact. Moreover, there is nothing in the reasons to suggest there was any evidence in the nature of, "He always meant to revise his will but never got around to it."

The trial court decision in *Morris* was discussed by the Commission in the Working Paper.[6] It is one of three or four cases which were frequently cited as demonstrating that the courts are applying the *Wills Variation Act* reasonably and sensibly and that, in particular, the claims of adult children are to be approached cautiously. In the light of the Court of Appeal's approach to *Morris*, that assertion can no longer be made with any degree of confidence.

A particular difficulty with the *Morris* decision is that it provides the trial courts with no useful guidelines. All it does is affirm that there is a wide but vague discretion to give effect to what the court sees as the testator's moral obligations. Given the example set by the Court of Appeal in *Morris*, a likely result will be an increased level of intervention by the courts in testamentary arrangements with the corresponding increase in the number of applications brought to court.

The implications of the *Morris* decision were the subject of critical comment in an annotation recently published in the Estates and Trusts Reports by Professor Gordon Bale.[7] He agrees that attempting to see that the testator's "moral obligations" are satisfied is essentially a subjective exercise, and suggests that:[8]

> There must be a rejection of the moral duty gloss which some Courts have added to the statute. It is only by returning to the statute itself and adopting the objective approach that there is any hope of achieving predictable awards. The objective approach involves asking the question — Does the dependant have adequate provision for his or her proper maintenance?

He continues:[9]

> If the courts continue to use the subjective approach, it also means that freedom of testation will be encroached upon to a greater extent than is necessary to achieve the objective of the statute. My assumption is that the statute's purpose is to assure the dependants of proper maintenance and not to assure dependants of a fair share of the estate. . . .
>
> In British Columbia, testamentary freedom has been eroded to a considerably greater extent than in other provinces because its Courts have too freely exercised a wide discretion which, it is submitted, is not to be found within the statute. The B.C. Courts have not simply limited testamentary freedom in order to provide maintenance which is clearly mandated by the statute but also to provide a fair distribution of the estate which is not mandated by the statute.

Professor Bale concludes with an observation concerning the relationship between the exercise of discretion under the *Wills Variation Act* and the work of this Law Reform Commission in relation to the interpretation of wills:[10]

> . . . It is ironic that it is the British Columbia Law Reform Commission which has recently published an excellent Report, *Interpretation of Wills*. . . . This Report recommends that legislation be enacted to confirm that the Courts' primary function in construing a will is to give effect to the testamentary directions in the will. It also recommends that all relevant evidence, including statements made by the testator or other evidence of his intent should be admissible to determine the meaning the testator attaches to the words used in his will. The Report also recommends that rules of construction should not take a precedence over the meaning which the testator attaches to his words. The Report

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[6] Law Reform Commission of British Columbia, Working Paper on Statutory Succession Rights, 105 (W.P. No. 35, 1982).

[7] *Supra*, n. 4 at 36.

[8] *Ibid*. at 40.

[9] *Ibid*. at 41.

[10] *Ibid*. at 42.

> further recommends wide powers of rectification provided the Court is satisfied that a will fails to carry out the testator's intentions.
>
> It may be ironic that it is the Law Reform Commission of the Province, whose Courts have more severely restricted testamentary freedom through the wide interpretation of its testators' family maintenance legislation, which has proposed major reform to insure that the testator's intentions are paramount in construing a will . . . It is all the more important that the report should receive prompt legislative attention. For it is submitted that in enacting the report emphasizing the paramount importance of the testator's intention in construing a will, the legislature will be sending a strong but subtle message to the Courts that both testamentary intention and, by inference, testamentary freedom are important social interests and should only be abrogated in order to provide proper maintenace under the *Variation of Wills Act*.

Here, I believe Professor Bale has identified an important point. The majority of the Commission, in endorsing the moral obligation approach being taken by the courts, is adopting a view which is fundamentally inconsistent with that which they took in the *Report on Interpretation of Wills*[11] and the earlier *Report on the Making and Revocation of Wills*.[12]

4. Reform

My comments above should give some flavour of the results I believe should flow under the Act. In one sense, no reform is called for since the language of the Act is perfectly capable of supporting what I would regard as a rational and acceptable regime of dependant's relief. However, given the interpretation the Act has attracted, I believe it would be desirable to restate some of the fundamental provisions of the Act in clearer and somewhat more restrictive terms.

Happily, I am able to draw on the work done by the Alberta Institute of Law Research and Reform in developing a new *Family Relief Act* which the Institute has recommended for adoption in that Province.[13] There are two provisions of their recommended Act which meet my concerns and which I believe should be adopted in British Columbia in a slightly modified form. They constitute my personal recommendations for reform of the *Wills Variation Act* and are set out below.

First, relief under the Act should be confined to "dependants" and dependant should be defined to mean:[14]

(i) the spouse of the testator,

(ii) a child of the testator who is under the age of 19 at the time of the testator's death,

(iii) a child of the testator under the age of 23 at the time of the testator's death who has not completed his education or his technical or vocational training and was dependent on the testator at the time of the testator's death, or would have been dependent had the testator survived,

(iv) a child of the testator who is 19 years of age or over at the time of the testator's death and unable by reason of mental or physical disability to earn a reasonable livelihood,

(v) a person whose marriage to the testator was terminated or declared void by a decree absolute of divorce or a decree or declaration of nullity of marriage and in whose favour an order or agreement for maintenance or support was subsisting imme-

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[11] Law Reform Commission of British Columbia, *Report on Interpretation of Wills* (LRC 58, 1982).

[12] Law Reform Commission of British Columbia, *Report on the Making and Revocation of Wills* (LRC 52, 1981).

[13] Alberta Institute of Law Research and Reform, *Family Relief* (Report No. 29, 1978).

[14] *Compare*, Alberta Report, *ibid.* at 166.

diately prior to the testator's death, or in whose favour, in the opinion of the court, an order of support would have been granted, provided that an application for the order had been made but not determined during the lifetime of the testator,

(vi) a parent, grandparent, sibling or minor stepchild of the testator who, for a period of at least three years immediately prior to the date of the death of the testator, was dependent upon the testator for maintenance and support.

I would be content if the term spouse bears the extended meaning given to it in majority Recommendation 10 (c).

The pivotal provision of the *Wills Variation Act* is section 2 (1). I believe that it should be restated along the following lines:[15]

> Where, upon the application by or on behalf of the dependants or any of them, it appears to the court that the dependants or any of them do not have proper maintenance and support either from the estate of the testator or otherwise, the court may in its discretion, notwithstanding the provisions of the will, order that such provision as it deems adequate be made out of the estate of the testator for the proper maintenance and support of the dependants or any of them.

Earlier, I referred to the issue of symmetry between the testator's obligations before and after death. There is one way in which the *Wills Variation Act*, as presently applied, achieves a symmetry of sorts which would be absent if the above provision were adopted without further qualification. The suggested provision is support oriented and does not necessarily extend to permit a division of family property which would have occurred had a "triggering event" under the *Family Relations Act* occurred immediately before the testator's death. These rights are discussed in the main body of this Report.[16] This situation is capable of yielding anomalous results. It means that the faithful spouse who remains with the testator until his or her death may be placed in a worse financial position than the spouse whose conduct leads to a "triggering event" on the eve of the testator's death.

This difficult issue was considered by the Alberta Institute in its Report:[17]

> We believe that, if spouses are living together at death, the spouse who dies first will, but for the exceptional case, dispose of his property by will so as to make generous provision for the surviving spouse. We are, however disturbed that, in the exceptional case, a wife who has continued to live with her husband until her husband's death may not receive as large a share of the property of the husband as a wife who has been living separately for a year prior to her husband's death and who is entitled to a matrimonial property order. In some cases, this unfortunate disparity in the property rights of the surviving spouse who is not entitled to a matrimonial property order may be fully or partially corrected through a judge exercising his discretion under The Family Relief Act and making an order out of the estate in favour of the surviving spouse. If The Family Relief Act continues to be a statute based on the need of the applicant, there will be some cases in which no order can be made.
>
> We have considered whether The Family Relief Act should be restructured to compensate for the fact that when a marriage is terminated by death, the surviving spouse who was living with the deceased spouse is not entitled to apply for a matrimonial property order. We have concluded that The Family Relief Act should continue to be a support statute. If there is to be an equitable division of property acquired by parties to a marriage, we believe as we stated in our Matrimonial Property Report that this should be achieved through a matrimonial property statute.

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[15] Compare, Alberta Report, supra, n. 12 at 167.

[16] See Chapter IV.

[17] Supra, n. 13 at 12.

I agree with the Alberta Institute's view as to the legislative context in which this issue should, ideally, be addressed. I believe, however, that until the *Family Relations Act* is thoroughly reviewed and rationalized, the *Wills Variation Act* should contain some elasticity which would permit the court to make an appropriate adjustment where the concept of proper maintenance and support falls clearly short of the applicant spouse's inchoate rights under the *Family Relations Act*. I recommend that a provision along the following lines be enacted:

(a) On an application under section 2 (1) by the testatator's spouse the court may order that additional financial provision be made for the spouse which is reasonable in all the circumstances.

(b) In determining a spouse's entitlement to additional financial provision under paragraph (a) the court, in addition to any other relevant circumstance, may have regard to what the financial position of the spouse would have been had an interest in family assets arisen under the *Family Relations Act* immediately before the testator's death.

5. Variation of Rights on Intestate Succession

The first recommendation in the main body of the Report is that the principles of the *Wills Variation Act* should apply to intestate estates. I wish to make it clear that I firmly support this recommendation and that, in this context, I believe the wider discretion currently exercised with respect to testate succession under the *Wills Variation Act* is appropriate. Where the testator has not left a will, by definition he has not turned his mind toward the obligations which he owes to others and the question of freedom of testation as a competing value does not arise. It is therefore justifiable to permit the courts to enter into a wider ranging inquiry into the claims of others on the deceased which is not confined to proper maintenance and support. It flows from this that I believe dependant's relief legislation should provide the courts with two differing sets of criteria, one relevant to testate succession and the other to intestate succession.

C. The Entitlement of a Surviving Spouse on an Intestacy

1. The Issue

I share the concern of the majority of the Commissioners that the scheme of intestate succession presently provided in the *Estate Administration Act* does not make fair or adequate provision for the surviving spouse of the deceased. In the Working Paper, we explored two different approaches to improving the legal position of the surviving spouse. The first approach was to adhere to the present scheme, but give the surviving spouse a much larger "preferred share" of the estate and a larger proportion of the residue where the deceased had two or more children. The second approach was more radical. It would simply leave the whole of the deceased's estate to his or her surviving spouse. In either case, a readjustment would be possible under the proposal that *Wills Variation Act* principles apply on an intestacy.

The Working Paper did not express a preference for either approach and our proposal set them out as alternatives. A majority of Commissioners have been persuaded that the first approach is preferable and their conclusion is set out in recommendation number 2. I am persuaded that the second approach (which for convenience I shall refer to as the all-to-the-spouse rule) should be adopted. My reasons are set out below.

2. Patterns of Testation

A statutory scheme of intestate succession is, at bottom, a statutory will. Where a person fails to make his own will, the law steps in and makes a will for him. It is therefore important that the statutory will should conform to community expectations as to what is a fair and appropriate disposition of the deceased's estate. The best guide to community feelings in this regard is the way testators are, in fact, disposing of their property.

In the course of this study empirical information was gathered in an attempt to identify patterns of testation within the Province. Information was gathered from both the Vancouver probate registry and succession duty returns. The information gathered is set out in appendices F and G to this Report. The statistics developed from this data are revealing.

If attention is focused on those estates in which the deceased was survived by both spouse and children, in approximately 80% of the cases the testator's spouse was the sole beneficiary. The statistics gathered from two different sources over two different time spans coincide remarkably on this point. The succession duty returns yield a figure of 79% and the probate registry figures yield 81%.

The conclusion I draw from this is that all-to-the-spouse, as a default rule, has overwhelming support within the community and this argues heavily in favour of its adoption.

3. Trends in Intestate Succession

The notion that a surviving spouse (particularly a wife) should have significant rights to succeed on an intestacy is a relatively recent one. Until the 19th century, the rights of surving spouses were limited to claims to property in the nature of dower and curtesy and these rights were easily barred through conveyancing devices. In addition, a spouse was entitled to one-third of the residue of the deceased's personal property.[18]

Toward the end of the last century the notion that a surviving spouse should have expanded rights emerged. In 1898 legislation was enacted which permitted a surviving spouse to a share of the residue of real property in certain circumstances.[19] Somewhat later the concept of the survivor's preferred share emerged.[20] Since that time the rights of the surviving spouse have been periodically strengthened both through increasing the size of the preferred share and expanding the classes of persons against whom the preferred share might be asserted and through giving the survivor a larger share of the residue in particular circumstances. Similar developments have taken place in other jurisdictions in Canada.

A concern to enhance the position of the surviving spouse continues. The recommendations of the majority of this Commission represent a substantial move in that direction. Further evidence is provided by a Private Members Bill introduced this session into the British Columbia legislature designed to increase the amount of the spouses preferred share.[21] That Bill received the support of all members of the legislature.[22]

It is my view that the logical culmination of all these developments is an all-to-the-spouse rule. I suggest that rather than engaging in a further 20 years

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[18] Under 22 & 23 Car. 2, c. 10, s. V (1670), a "received" English statute.

[19] *See* S.B.C. 1898, c. 40, Sched. I.

[20] *See* S.B.C. 1925, c. 2, s. 4 enacting s. 114 (1). The preferred share has its origins in English legislation enacted in 1890. *See, Intestate's Estates Act, 1890*, 53-4 Vict. c. 29.

[21] *Estate Administration Amendment Act*, 1983, 1980 B.C. Bill No. M210.

[22] Votes and Proceedings, Aug. 25, 1983 (Second Reading); Votes and Proceedings, Sept. 15, 1983 (Third Reading). the Act received royal assent on September 23, 1983 and is cited as S.B.C. 1983, c. 4.

of legislative tinkering a bolder move is called for: the immediate adoption of an all-to-the-spouse rule.

4. An All-to-the-Spouse Rule is Simple

On a matter as important as intestate succession, I believe it is important that the law should be simple, straightforward and easily understood by the non-lawyer. An all-to-the-spouse rule fulfills these requirements admirably. In contrast, the present regime, endorsed with modifications by the majority may involve considerable complexity.

The preferred share of the surviving spouse immediately raises the question "share of what?" The division of property between the spouse and the children of the deceased may raise nice questions of valuation and contain seeds of conflict as to what property should be sold, what property should be distributed *in specie*, and who should get what. Some of these problems are explored in the body of the Report.[23]

The provisions of the Act which give the surviving spouse a life interest in the family home add a further dimension of complexity. The body of the Report explores some of the difficult questions which may arise concerning the life interest and the possible lines of their solution.[24]

The majority, in Recommendations 7 and 8, would replace the life interest in the matrimonial home with a right of election for the surviving spouse. These recommendations would achieve something of an improvement, in substance, over the present law but, given the procedures that would surround the exercise of the right of election, it cannot be said that a significant degree of simplification has been achieved.

The adoption of an all-to-the-spouse rule neatly side-steps all these complexities.

5. Reform

No scheme of intestate distribution can be perfect in the sense that it provides a fair and workable distribution of assets in every conceivable circumstance. It is my view that the essentially arbitrary nature of the exercise should be explicitly recognized. The aim should be to produce a simple and easily understood rule which achieves justice in a majority of cases rather than a more complex scheme which attempts to respond to the exigencies of situations which will arise only rarely.

It is obvious that there will be situations in which an all-to-the-spouse rule will achieve inappropriate results, but this objection is far from fatal. First, the deceased can always make a will which is more in tune with the needs of his successors. Second, the availability of relief under the *Wills Variation Act*, as recommended, would provide a flexible way of dealing with unusual situations.

I therefore recommend that:

The Estate Administration Act *be amended to provide that upon an intestacy or partial intestacy, the surviving spouse should be entitled to receive the entire intestate estate.*

[23] Chapter I, part 10 (c).
[24] *Ibid.*

APPENDICES

APPENDIX A

UNIFORM CHILD STATUS ACT

(As adopted by the Conference: See 1980 Proceedings, page 103)

Court

1. (1) In Section 5 to 8 "court" means (*insert name of court to have jurisdiction*).

Director

(2) In this Act "director" means the Director of Vital Statistics.

Void and voidable marriage

(3) For the purpose of sections 9 and 11,

(*a*) where a man and woman go through a form of marriage with each other with at least one of them doing so in good faith and they cohabit and the marriage is void, they shall be deemed to be married during the time they cohabit, and

(*b*) where a voidable marriage is decreed a nullity, the man and woman shall be deemed to be married until the date of the decree of nullity.

Person is child of natural parents

2. (1) Subject to subsection (2) and section 11, for all purposes of the law of (*enacting jurisdiction*) a person is the child of his natural parents, and his status as their child is independent of whether he is born inside or outside marriage.

Effect of adoption

(2) Where an adoption order has been made, sections of the Act apply and the child is in law the child of the adopting parents as if they were the natural parents.

NOTE: THE BLANKS IN THIS SUBSECTION ARE TO BE FILLED IN WITH REFERENCE TO THE ENACTING JURISDICTION'S ADOPTION LEGISLATION AND ITS PROVISIONS RESPECTING TERMINATION OF RELATIONSHIPS WITH NATURAL PARENTS AND RECOGNITION OF FOREIGN ADOPTIONS.

Kindred relationships

(3) Kindred relationships shall be determined according to the relationships described in subsection (1) or (2) and section 11.

Abolition of distinction

(4) Any distinction between the status of a child born inside marriage and a child born outside marriage is

abolished and the relationship of parent and child and kindred relationships flowing from that relationship shall be determined in accordance with this section and section 11.

Construction of instruments and enactments

3. For the purpose of construing an instrument or enactment, a reference to a person or group or class of persons described in terms of relationship to another person by blood or marriage shall be construed to refer to and include a person who comes within the description by reason of the relationship of parent and child as determined under sections 2 and 11.

Application

4. This Act applies to an enactment before, on or after the day this Act comes into force and to an instrument made on or after the day this Act comes into force, but it does not affect

(*a*) an instrument made before this Act comes into force; or

(*b*) a disposition of property made before this Act comes into force.

Declaration

5. (1) Any person having an interest may apply to the court for a declaratory order that a person is or is not in law the mother of a child.

Order

(2) Where the court finds on the balance of probabilities that a person is or is not the mother of a child, the court may make a declaratory order to that effect.

Declaration

6. (1) Any person having an interest may apply to the court for a declaratory order that a person is or is not in law the father of a child.

Order

(2) Where the court finds on the balance of probabilities that a person is or is not the father of a child, the court may make a declaratory order to that effect.

One presumption

(3) Where the court finds that a presumption of paternity under section 9 applies, the court shall make a declaratory order confirming that the paternity is recognized in law unless it is established on the balance or probabilities that the presumed father is not the father of the child.

Conflicting presumptions

(4) Where circumstances exist that give rise under section 9 to conflicting presumptions as to the paternity of a child and the court finds on the balance of probabilities

that a person is the father of a child, the court may make a declaratory order to that effect.

No order if father or child dead

(5) A declaratory order that a person is in law the father of a child shall not be made under this section unless the father and the child whose relationship is sought to be established are living.

Exception if presumption

(6) Notwithstanding subsection (5), where only the father or the child is living, a declaratory order that a male person is in law the father of a child may be made under this section if circumstances exist that give rise to a presumption of paternity under section 9.

Blood tests

7. (1) On the application of a party to a proceeding under section 5 or 6 the court may, subject to conditions it considers appropriate, give the party leave to obtain blood tests of persons named by the court and to submit the results in evidence.

Incapacity

(2) Where a person named by the court is not capable of consenting to having a blood test taken, the consent shall be deemed to be sufficient.

(*a*) where the person is a minor of the age of 16 years or more, if the minor consents,

(*b*) where the person is a minor under the age of 16 years, if the person having the charge of the minor consents, and

(*c*) where the person is not capable of consenting for any reason other than minority, if the person having his charge consents and a medical practitioner certifies that the giving of a blood sample would not be prejudicial to his proper care and treatment.

Inference from refusal

(3) Where a person named by the court refuses to submit to a blood test the court may draw any inference it considers appropriate.

Order to be recognized

8. (1) Subject to this section, a declaratory order made under section 5 or 6 shall be recognized for all purposes.

New evidence

(2) Where a declaratory order has been made under section 5 or 6 and evidence that was not available at the previous hearing becomes available, the court may, on application, discharge the order.

(3) Where an order is discharged under subsection (2), Effect of new order
(a) rights and duties which have been exercised and observed; and
(b) interests in property which have been distributed as a result of the order before its discharge.
are not affected.

9. Unless the contrary is proved on the balance of probabilities, a person shall be presumed to be the father of a child in one or more of the following circumstances: Presumption of paternity
(a) he was married to the mother at the time of the child's birth;
(b) he was married to the mother by a marriage that was terminated by
(i) death or judgment of nullity that occurred, or
(ii) divorce where the decree nisis was granted within 300 days, or a longer period the court may allow, before the birth of the child;
(c) he married the mother after the child's birth and acknowledges that he is the father;
(d) he and the mother have acknowledged in writing that he is the father of the child;
(e) he was cohabiting with the mother in a relationship of some permanence at the time of the child's birth or the child was born within 300 days, or longer period the court may allow, after the cohabitation ceased;
(f) he has been found or recognized by a court to be the father of the child.

10. (1) The registrar or clerk of every court in (enacting juridsiction) shall file in the office of the director a statment respecting each order or judgment of the court which makes a finding of parentage or that is based on a recognition of parentage. Orders to be filed with director

(2) A written acknowledgement of paternity referred to in section 9 may be filed in the office of the director. Acknowledgements to be filed with director

(3) On application and on satisfying the director that the information is not to be used for an unlawful or improper purpose, any person may inspect and obtain from the director a certified copy of Inspection of filings

(*a*) a statement or acknowledgment filed under this section,

(*b*) a statutory declaration filed under section 3(6) of the *Uniform Vital Statistics Act*, or

(*c*) a request filed under section 3(8) of the *Uniform Vital Statistics Act*.

Director need not amend

(4) Subject to subsection (5), the director is not required to amend the register of births in relation to a statment or acknowledgment filed under this section.

Director shall amend

(5) On receipt of a statement under subsection (1) in relation to a declaratory order made under section 5 or 6, the director shall, in accordance with section 39 of the *Uniform Vital Statistics Act*, amend the register of births accordingly.

Interpretation

11. (1) In this section, "artificial insemination" includes the fertilization by a man's semen of a woman's ovum outside of her uterus and subsequent implantation of the fertilized ovum in her.

Father by artificial insemination

(2) A man whose semen was used to artificially inseminate a woman is in law the father of the resulting child if he was married to or cohabiting with the woman at the time she is inseminated even if his semen were mixed with the semen of another man.

Husband deemed after

(3) A man who is married to a woman at the time she is artificially inseminated solely with the semen of another man shall be deemed in law to be the father of the resulting child if he consents in advance to the insemination.

Cohabiting man deemed father

(4) A man who is not married to a woman with whom he is cohabiting at the time she is artificially inseminated solely with the semen of another man shall be deemed in law to be the father of the resulting child if he consents in advance to the insemination, unless it is proved that he refused to consent to assume the responsibilities of parenthood.

Treated as child

(5) Notwithstanding a married or cohabiting man's failure to consent to the insemination or consent to assume the responsibilities of parenthood under subsection (3) or (4) he shall be deemed in law to be the father of the resulting child if he has demonstrated a settled intention to treat the child as his child unless it is proved that he did not know that the child resulted from artificial insemination.

(6) A man whose semen is used to artificially inseminate a woman to whom he is not married or with whom he is not cohabiting at the time of the insemination is not in law the father of the resulting child. Certain persons not fathers

Consequential Amendments

The *Uniform Legitimacy Act* should be repealed.

The *Uniform Vital Statistics Act* should be amended as follows:

(1) Section 3(3), by striking out "an illegitimate child" and substituting "a child born outside marriage".

(2) Section 5(1), by striking out "Where a child is legitimated by the intermarriage of his parents subsequent to his birth," and substituting "Where after the birth of a child his parents marry each other".

(3) Section 5(1)(*b*), by striking out "as to the legitimation".

(4) Section 32(2), repeal.

NOTE: ENACTING JURISDICTIONS SHOULD CHECK RELEVANT STATUTES AND AMEND THEM ACCORDINGLY TO ENSURE COMPATIBILITY WITH THIS ACT.

The Uniform Child Status Act is amended by adding thereto the following sections:

(As adopted by the Conference: See 1981 Proceedings, page 72)

Recognition of Extra-Provincial Determination of Paternity

12. In sections 13 to 22, Interpretation

(*a*) "extra-provincial declaratory order" means an order in the nature of a declaratory order provided for in section 6 but made by a court outside of (*enacting jurisdiction*);

(*b*) "extra-provincial finding of paternity" means a judicial finding of paternity that is made incidentally in the determination of another issue by a court outside of (*enacting jurisdiction*) and that is not an extra-provincial declaratory order.

Recognition of orders elsewhere in Canada

13. An extra-provincial declaratory order that is made in Canada shall be recognized and have the same effect as if made in (*enacting jurisdiction*).

Recognition of orders made outside Canada

14. An extra-provincial declaratory order that was made outside Canada shall be recognized and have the same effect as if made in (*enacting jurisdiction*) if,

(*a*) at the time the proceeding was commenced or the order was made, either parent was domiciled,

(i) in the territorial jurisdiction of the court making the order, or

(ii) in a territorial jurisdiction in which the order is recognized;

(*b*) the court that made the order would have had jurisdiction to do so under the rules that are applicable in (*enacting jurisdiction*)

(*c*) the child was habitually resident in the territorial jurisdiction of the court making the order at the time the proceeding was commenced or the order was made; or

(*d*) the child or either parent had a real and substantial connection with the territorial jurisdiction in which the order was made at the time the proceeding was commenced or the order was made.

Exceptions

15. A court may decline to recognize an extra-provincial declaratory order and may make a declaratory order under this Act where,

(*a*) new evidence that was not available at the hearing becomes available; or

(*b*) the court is satisfied that the extra-provincial declaratory order was obtained by fraud or duress.

Filing with director

16.—(1) A copy of an extra-provincial declaratory order, certified under the seal of the court that made it, may be filed in the office of the director but where the extra-provincial declaratory order is made outside of Canada, the copy shall be accompanied by,

(*a*) the opinion of a lawyer that the declaratory order is entitled to recognition under the law of (*enacting jurisdiction*);

(*b*) a sworn statement by a lawyer or public official in

the extra-provincial territorial jurisdiction as to the effect of the declaratory order; and

(*c*) such translation, verified by affidavit, as the director requires.

Amendment of record

(2) Upon the filing of an extra-provincial declaratory order under this section, the director shall, in accordance with section 39 of the *Uniform Vital Statistics Act*, amend the register of births accordingly, but where the extra-provincial declaratory order contradicts paternity found by an order already filed, the director shall restore the amended record as if unaffected by it or previous orders.

Liability of director

(3) The director is not liable for any consequences resulting from filing under this section material that is apparently regular on its face.

Evidence

17. A copy of an extra-provincial declaratory order, certified under the seal of the court that made it, is admissible in evidence without proof of the signatures or office of any person executing the certificate.

Findings of paternity elsewhere in Canada

18. An extra-provincial finding of paternity that is made in Canada shall be recognized and have the same effect as if made in (*enacting jurisdiction*) under the same circumstances.

Findings of paternity outside Canada

19. An extra-provincial finding of paternity that is made outside Canada by a court that has jurisdiction to determine the matter in which the finding was made as determined by the conflict of laws rules of (*enacting jurisdiction*) shall be recognized and have the same effect as if made in (*enacting jurisdiction*) under the same circumstances.

Evidence

20. A copy of an order or judgment in which an extra-provincial finding of paternity is made, certified under the seal of the court that made it, is admissible in evidence without proof of the signature or office of any person executing the certificate.

Presumption where conflicting findings

21. There shall be no presumption of paternity under section 9(*f*) where contradictory findings of paternity exist, whether extra-provincial or otherwise.

Application

22. Sections 12 to 21 apply to extra-provincial declaratory orders and extra-provincial findings of paternity whether made before or after sections 12 to 21 come into force.

APPENDIX B

SUCCESSION LAW REFORM ACT (ONT.)

(R.S.O. 1980, c. 448)
Sections 71 and 72

Property devised

71. Where a deceased,

(a) has, in his lifetime, in good faith and for valuable consideration, entered into a contract to devise or bequeath any property; and

(b) has by his will devised or bequeathed that property in accordance with the provisions of the contract,

the property is not liable to the provisions of an order made under this Part except to the extent that the value of the property in the opinion of the court exceeds the consideration therefor.

Value of certain transactions deemed part of estate

72. (1) Subject to section 71, for the purpose of this Part, the capital value of the following transactions effected by a deceased before his death, whether benefitting his dependant or any other person, shall be included as testamentary dispositions as of the date of the death of the deceased and shall be deemed to be part of his net estate for purposes of ascertaining the value of his estate, and being available to be charged for payment by an order under clause 63 (2) (f).

(a) gifts mortis causa;

(b) money deposited, together with interest thereon, in an account in the name of the deceased in trust for another or others with any chartered bank, savings office, credit union or trust company, and remaining on deposit at the date of the death of the deceased;

(c) money deposited, together with interest thereon, in an account in the name of the deceased and another person or persons and payable on death pursuant to the terms of the deposit or by operation of law to the survivor or survivors of those persons with any chartered bank, savings office, credit union or trust company, and remaining on deposit at the date of the death of the deceased;

(d) any disposition of property made by a deceased whereby property is held at the date of his death by the deceased and another as joint tenants;

(e) any disposition of property made by the deceased in trust or otherwise, to the extent that the deceased at the date of his death retained, either alone or in conjunction with another person or persons by the express provisions of the disposing instrument, a power to revoke such disposition, or a power to consume, invoke or dispose of the principal thereof, but the provisions of this clause do not affect the right of any income beneficiary to the income accrued and undistributed at the date of the death of the deceased;

(f) any amount payable under a policy of insurance effected on the life of the deceased and owned by him; and

(g) any amount payable under a designation of beneficiary under Part III.

Idem

(2) The capital value of the transactions referred to in clauses (1) (b), (c) and (d) shall be deemed to be included in the net estate of the deceased to the extent that the funds on deposit were the property of the deceased immediately before the deposit or the consideration for the property held as joint tenants was furnished by the deceased.

Burden of proof

(3) Dependants claiming under this Part shall have the burden of establishing that the funds or property, or any portion thereof, belonged to the deceased.

Idem

(4) Where the other party to a transaction described in clause (1) (c) or (d) is a dependant, he shall have the burden of establishing the amount of his contribution, if any.

Exception

(5) This section does not prohibit any corporation or person from paying or transferring any funds or property, or any portion thereof, to any person otherwise entitled thereto unless there has been personally served on the corporation or person a certified copy of a suspensory order made under section 59 enjoining such payment or transfer.

Suspensory order

(6) Personal service upon the corporation or person holding any such fund or property of a certified copy of a suspensory order shall be a defence to any action or proceeding brought against the corporation or person with respect to the fund or property during the period the order is in force.

Rights of creditor

(7) This section does not affect the rights of creditors of the deceased in any transaction with respect to which a creditor has rights.

APPENDIX C

UNIFORM DEPENDANT'S RELIEF ACT

Section 21

21. (1) Where, upon an application for an order under section 2, it appears to the court that

(a) the deceased has within one year prior to his death made an unreasonably large disposition of real or personal property

(i) as an immediate gift *inter vivos*, whether by transfer, delivery, declaration of revocable or irrevocable trust or otherwise, or

(ii) the value of which at the date of the disposition exceeded the consideration received by the deceased therefor; and

(b) there are insufficient assets in the estate of the deceased to provide adequate maintenance and support for the dependants or any of them,

the court may, subject to subsection (2), order that any person who benefited, or who will benefit, by the disposition pay to the executor, administrator or trustee of the estate of the deceased or to the dependants or any of them, as the court may direct, such amount as the court considers adequate for the proper maintenance and support of the dependants or any of them.

(2) The amount that a person may be ordered to pay under subsection (1) shall be determined in accordance with the following rules:

1. No person to whom property was disposed of is liable to contribute more than an amount equal to the extent to which the disposition was unreasonably large.
2. If the deceased made several dispositions of property that were unreasonably large, no person to whom property was disposed of shall be ordered to pay more than his *pro rata* share based on the extent to which the disposition was unreasonably large.
3. The court shall consider the injurious effect on a person to whom property was disposed of from an order to pay in view of any circumstances occurring between the date of the disposition of the property and the date on which the transferee received notice of the application under section 2.
4. If the person to whom the property was disposed of has retained the property, he is not liable to contribute more than the value of his beneficial interest in the property.
5. If the person to whom property was disposed of has disposed of or exchanged the property in whole or in part, he is not liable to contribute more than the combined value of any remaining original property and any remaining proceeds or substituted property.
6. For the purposes of paragraphs 4 and 5 "value" is the fair market value as at the date of the application under section 2.

(3) In determining whether a disposition of property is a disposition of an unreasonably large amount of property within the meaning of subsection (1), the court shall consider

(a) the ratio of value of the property disposed of to the value of the property determined under this Act to comprise the estate of the deceased at the time of his death;

(b) the aggregate value of any property disposed of under prior and simultaneous dispositions and for this purpose the court shall consider all dispositions drawn to its attention whether made prior or subsequent to one year prior to the death of the deceased;

(c) any moral or legal obligation of the deceased to make the disposition;

(d) the amount, in money or moneys worth, of any consideration paid by the person to whom the property was disposed; and

(e) any other circumstance that the court considers relevant.

APPENDIX D

FAMILY PROVISION BILL, 1977 (NEW SOUTH WALES)

PART III
NOTIONAL ESTATE

Interpretation

22. In this Part, except in so far as the context or subject matter otherwise indicates or requires—

"deceased person" means a person in relation to whose notional estate an order is sought under Part II.

"disposition of property" includes—

(a) any conveyance, transfer, assignment, appointment, settlement, mortgage, delivery, payment, lease, bailment, reconveyance, discharge of mortgage or other alienation of property;

(b) the creation of a trust;

(c) the release, surrender, or abandonment of any property; and

(d) the grant or exercise of a power in relation to property,

whether having effect at law or in equity and whether effected with or without an instrument in writing.

"gift" means any disposition of property made otherwise than by will without full consideration.

"settlement", in relation to a deceased person, includes any disposition of property, or agreement for a disposition of property, under which any trust or provision relating to property is to take effect, or the possession or enjoyment of property is to change, on or after the death of the deceased person.

Property subject to the statutory trust.

23. (1) Where, immediately before his death, under a disposition of property or an agreement made on or after the appointed day, a deceased person had power to dispose of any property for his own benefit or had power to dispose of any property for the benefit of an eligible person, that property is, from and after the death of the deceased person, subject to the statutory trust.

(2) Where, on or after the appointed day, a deceased person made a settlement by way of gift and, immediately before his death, any property comprised in the settlement was, by the terms of the settlement, not absolutely vested—

(a) in a person beneficially; or

(b) for a charitable purpose,

that property is, from and after the death of the deceased person, subject to the statutory trust.

(3) Where—

(a) under a disposition of property or an agreement made on or after the appointed day, a deceased person and another person are, immediately before the death of the deceased person, jointly entitled to any property; and

(b) a beneficial interest in that property passes or accrues by survivorship to that other person on the death of the deceased person,

that property is, from and after the death of the deceased person, subject to the statutory trust.

(4) (a) This subsection applies where—

(i) a policy of assurance on the life of a deceased person is made on or after the appointed day;

(ii) the premium on the policy, or part of the premium, is paid, directly or indirectly, by the deceased person;

(iii) immediately before his death, the deceased person had power to surrender or otherwise deal with the policy or its proceeds for his own benefit or had power to surrender or otherwise deal with the policy or its proceeds for the benefit of an eligible person; and

(iv) money (in this section called "the proceeds") is payable under the policy in consequence of his death.

(b) Where the deceased person contributed to a scheme, fund or plan and a premium is paid, or part of a premium is paid out of the assets of the scheme, fund or plan, the payment, to the extent to which its amount does not exceed the amount of his contributions, is, for the purposes of this subsection, a payment by the deceased person.

(c) For the purposes of paragraph (a) (iii), the deceased person had power to deal with the policy or its proceeds as mentioned in paragraph (a) (iii) notwithstanding that he may not do so except with the consent of the insurer or of some other person, being a person not having any beneficial interest in the policy or its proceeds.

(d) For the purposes of paragraphs (e) and (f), the net payment by the deceased person is the amount of the premium paid by the deceased person, less the amount of any reimbursement in money or money's worth made in his lifetime, directly or indirectly, to him, or to any scheme, fund or plan to which he contributed, for the premiums paid by him.

(e) Where the net payment by the deceased person is equal to the whole of the premium, the whole of the proceeds is, from and after the death of the deceased person, subject to the statutory trust.

(f) Where the net payment by the deceased person is equal to a part of the premium, a like part of the proceeds is, from and after the death of the deceased person, subject to the the statutory trust.

(5) Where—

(a) by virtue or in pursuance of—

(i) a disposition of property or agreement made on or after the appointed day by a deceased person; or

(ii) the memorandum, articles or rules (whether or not comprised in an Act or made under an Act) of any body (corporate or unincorporate), association, scheme, fund or plan of or in which a deceased person became a member or participant on or after the appointed day,

a benefit accrues to any person or money is paid or payable to any person by reason of the deceased person having died while he was holding an office or while he was an employee; and

(b) that person, in the opinion of the Court, is an eligible person, whether or not he is an applicant under this Act for an appointment for provision,

the benefit or the money is, if the Court so orders, from and after the death of the deceased person, subject to the statutory trust, whether or not the benefit or payment is enforceable and whether or not that person was ascertained on the death of the deceased person and whether or not the benefit accrues or the payment is made pursuant to the exercise of a discretion by any person.

(6) Where, within 3 years before his death and on or after the appointed day, a deceased person made a gift with the intention, wholly or in part, of defeating, wholly or in part, an application under section 9, the gift shall take effect, and the rights and interests of all persons shall be, as if the property comprised in the gift was, immediately before the gift, subject to the statutory trust.

(7) Where—

(a) a deceased person had power to make a disposition of property for his own benefit or had power to make a disposition of property for the benefit of an eligible person; and

(b) within 3 years before his death and on or after the appointed day, the deceased person, in exercise of the power, disposed of the property with the intention, wholly or in part, of defeating, wholly or in part, an application under section 9,

the disposition shall take effect, and the rights and interests of all persons shall be, as if the property was, immediately before the disposition, subject to the statutory trust.

(8) Where, at the time of any disposition of property by a deceased person, the deceased person would have had power to dispose of the property to a person if that person had been born or had attained some age or if some other event had happened, then, for the purposes of subsection (7), if before the death of the deceased person that other person is born or attains that age or that other event happens, the deceased person had the power at the time of the disposition.

(9) Where, within 12 months before his death and on or after the appointed day, a deceased person made an unjust gift, the gift shall take effect, and the rights and interests of all persons shall be, as if the property comprised in the gift was, immediately before the gift, subject to the statutory trust.

(10) For the purposes of subsection (9), a gift is unjust if, in the opinion of the Court—

(a) at the date of the gift, any moral obligation of the deceased person to make provision, by will or otherwise, for the maintenance, education or advancement in life of an eligible person was substantially greater than any moral obligation of the deceased person to make the provision which he made by the gift, and

(b) the estate of the deceased person is insufficient to satisfy the provision that should be made under this Act for an eligible person.

(11) This section has effect subject to sections 24, 25 and 27.

Exclusion: actual estate.

24. Property in the estate of a deceased person is not subject to the statutory trust.

Exclusion: confirmed transaction.

25. (1) In this section, "transaction" means, in relation to property which, but for this section, is or may become subject to the statutory trust by virtue of the respective enactments mentioned in any of the paragraphs below in this subsection, the transaction specified in the paragraph, namely—

(a) the disposition of property or agreement mentioned in section 23 (1);
(b) the settlement mentioned in section 23 (2);
(c) the disposition of property or agreement mentioned in section 23 (3);
(d) the making of the policy of assurance mentioned in section 23 (4);
(e) the disposition of property or agreement mentioned in section 23 (5) (a) (i);
(f) the transaction by which the deceased person became a member or participant as mentioned in section 23 (5) (a) (ii);
(g) the gift mentioned in section 23 (6);
(h) the disposition mentioned in section 23 (7); or
(i) the gift mentioned in section 23 (8).

(2) In this section, "person concerned", in relation to any transaction, means a person in respect of whose notional estate in case of his death property would or might become subject to the statutory trust by virtue of section 23 and in consequence of the transaction.

(3) For the purposes of this section, a person is interest under this Act if—

(a) where the Court hears proceedings under this section before the death of the person concerned he is a person who, had the person concerned died immediately before the hearing, would be an eligible person or a person who might be made liable to all or any of the burden of an order for provision under Part II; or
(b) where the Court hears proceedings under this section after the death of the person concerned he is an eligible person or a person who might be made liable to the burden of an order for provision under Part II.

(4) Where it appears to the Court that any transaction is, at the time when the transaction is made, not unreasonable having regard to the interests of the persons who are or may become entitled to any interest under the transaction and to the interests of all or any of the persons interested under this Act, the Court may confirm the transaction as mentioned in this section.

(5) An application for confirmation under this section may be made by the person concerned or (before or after the death of the person concerned) by a person who is or may become entitled under the transaction.

(6) The Court may confirm the transaction, wholly or in part, as against all or any persons interested under this Act.

(7) Where the Court confirms the transaction, wholly or in part, as against all persons interested under this Act, property affected by the transaction is, to the extent of the order of confirmation, but subject to the terms of the order, not subject to the statutory trust.

(8) Where the Court confirms the transaction, wholly or in part, as against some one or more but not all persons interested under this Act, property affected by the transaction is, to the extent of the order of confirmation, but subject to the terms of the order, and as between persons who are or may become entitled to any interest in the property under the transaction and persons interested under this Act as against whom the transaction is confirmed, not subject to the statutory trust.

Exoneration of notional estate.

26. The Court may order or declare that the whole or any part of the notional estate of a deceased person shall not be the subject of an appointment or further appointment under this Act.

Allowance for consideration, etc.

27. (1) In the proceedings under Part II, the Court shall make a just allowance for—

(a) any consideration for a settlement or other disposition by the deceased person of property in the notional estate;
(b) any improvement made to property in the notional estate by a person taking the property under a settlement or other disposition by the deceased person or taking the property in default of disposition of the property by the deceased person; and

(c) any expenditure or liability incurred in respect of property in the notional estate by a person so taking.

(2) Where the Court makes an allowance under subsection (1) in respect of property in the notional estate, and two or more persons hold or have interests in the property, the Court shall make just apportionment of the allowance amongst those persons.

(3) A person to whom an allowance is made under this section in respect of property in the notional estate shall be entitled to a charge on the property for the amount of the allowance together with interest, in priority to the interests of persons claiming under the statutory trust.

(4) For the purposes of subsection (3), the Court shall fix the time from which interest on an allowance under this section is to run, having regard to the time when the consideration was given, improvement was made, or expenditure or liability was incurred, as the case requires.

(5) Interest on an allowance under this section shall run from the time fixed under subsection (4) until payment of the allowance.

(6) Interest under this section shall be at the rate prescribed or, subject to rules of court, at such rate as the Court may fix.

(7) The Court may make orders for raising the amount of a charge under this section and for payment to the persons entitled.

Statutory trust.

28. (1) The statutory trust is a trust for such one or more of the following objects, that is to say, all persons who are eligible persons in relation to the estate or notional estate of the deceased person and all persons entitled to an interest in the estate or notional estate of the deceased person, and in such manner and to such extent as the Court may from time to time appoint.

(2) The Court may, under the power of appointment in subsection (1), appoint that property subject to the statutory trust or such estate, charge, lien or other interest in property subject to the statutory trust as the Court may direct—

(a) be the property of an object of the power;

(b) be held on trust for an object of the power by a person appointed by or under direction of the Court, the trust to be in such terms and to contain such conditions, powers and provisions as the Court may direct.

(3) Subsection (2) does not limit the generality of subsection (1).

(4) Where property is subject to the statutory trust by virtue of section 23 (1), subsection (1) does not authorise an appointment of the property except in a manner in which the deceased person might lawfully and without any fraud on a power have disposed of the property immediately before his death.

(5) Where property is subject to the statutory trust by virtue of section 23 (3), subsection (1) authorises an appointment of the property to the extent of the beneficial interest in the property passing or accruing by survivorship on the death of the deceased person.

(6) Where money to the credit of a deceased person and another person in an account with a financial institution is subject to the statutory trust by virtue of section 23 (1) or (3), the Court may, under subsection (1), appoint only so much of the money as, in the opinion of the Court, is reasonable having regard to the circumstances in which the account was opened and to the deposits to the credit of the account, and the withdrawals from the account, made by the deceased person and the other person.

(7) In subsection (6), "financial institution" means a bank or a building society or any other person receiving money on current account or on deposit.

(8) A bank or other person holding any property subject to the statutory trust and acting in the ordinary course of business is not affected by the statutory trust notwithstanding notice of the facts by which the property is subject to the statutory trust, except where notice in writing of the statutory trust has been given to the bank by an administrator or by a person interested in the estate or notional estate of a deceased person.

(9) Where property is subject to the statutory trust by virtue of section 23 (7), subsection (1) does not authorise an appointment of the property except in a manner in which the deceased might lawfully and without any fraud on a power have disposed of the property immediately before his death, if he had not made the disposition mentioned in section 23 (7).

(10) Section 23 (8) has effect for the purpose of subsection (9) as it has effect for the purposes of section 23 (7).

Appointment under the statutory trust.

29. The Court may make an appointment under the statutory trust for the following purposes but, subject to section 35, no other—

(a) for the purpose of making an appointment for provision under section 9;

(b) for the purpose of making an appointment for immediate provision under section 10;

(c) for the purpose of giving effect to the terms on which appointments for provision are made under sections 9 and 10;
(d) for the purpose of providing for the manner in which the burden of any provision made under this Act is to be borne;
(e) for the purpose of giving effect to an order under section 16 revoking or altering any provision made under this Act for an eligible person;
(f) for the purpose of giving effect to an appointment under section 17 increasing any provision made under this Act for an eligible person.

Operation of appointment under the statutory trust.

30. (1) Where, under section 28, property subject to the statutory trust or an estate, charge, lien or other interest in property subject to the statutory trust is appointed, the Court may, to enable effect to be given to the appointment, make an order vesting the property or the estate, charge, lien or other interest in the property in the appointee.

(2) Sections 78 and 79 of the Trustee Act, 1925, apply to an order under subsection (1).

(3) Section 78 (2) of the Trustee Act, 1925, applies to an order under subsection (1) as if this section were included in the provisions of Part III of that Act.

Restrictions on the statutory trust.

31. (1) Subject to subsections (2) and (4), the statutory trust does not enable any person claiming a beneficial interest under it to commence proceedings in a court against any person bound by it.

(2) Subsection (1) does not apply to—
(a) proceedings for an order for provision under Part II; or
(b) proceedings commenced by leave of the Court given in proceedings for an order for provision under Part II.

(3) Subject to subsections (4) and (5), the statutory trust does not impose any personal liability on any person bound by it except liability for any thing done or left undone by him after notice to him of proceedings against him, being proceedings mentioned in subsection (2).

(4) Subsection (1) does not apply to, and subsection (3) does not affect, any proceedings so far as the proceedings are for or relate to the identification, preservation, disposal or recovery of property subject to the statutory trust.

(5) Where—
(a) notice is given as mentioned in subsection (3) to a person bound by the statutory trust,
(b) that person becomes liable by reason of the statutory trust for anything done or left undone by him after the notice is given, and
(c) afterwards that liability devolves on another person, whether on the personal representative of the person so bound in case of his death, or on his trustee in bankruptcy in case of his bankruptcy, or otherwise, that liability may be enforced against that other person notwithstanding that notice has not been given to that other person as mentioned in subsection (3).

(6) Notwithstanding any of the provisions of the Real Property Act, 1900, the statutory trust does not enable any person to lodge a caveat under that Act—
(a) before the death of the deceased person; or
(b) after the death of the deceased person, except by leave of the Court.

Effect of this Part on the Real Property Act, 1900.

32. Subject to section 31 (6), nothing in this Part affects any of the provisions of the Real Property Act, 1900, or any regulation made under that Act.

Notional estate outside the State.

33. Property which is situated outside New South Wales is not subject to the statutory trust.

APPENDIX E

ADMINISTRATION OF JUSTICE ACT 1969 (U.K.)

(1969, c. 58)

PART III

POWER TO MAKE WILLS AND CODICILS FOR MENTALLY DISORDERED PERSONS

Provision for executing will for patient

17. (1) In the Mental Health Act 1959 (in this Part of this Act referred to as "the principal Act"), in section 103 (1) (powers of the judge as to patient's property and affairs) the following paragraphs shall be inserted after paragraph (d)—

"(dd) the execution for the patient of a will making any provision (whether by way of disposing of property or exercising a power or otherwise) which could be made by a will executed by the patient if he were not mentally disordered, so however that in such cases as a nominated judge may direct the powers conferred by this paragraph shall not be exercisable except by the Lord Chancellor or a nominated judge;"

(2) At the end of session 103 (3) of the principal Act there shall be inserted the words "and the power of the judge to make or give an order, direction or authority for the execution of a will for a patient—

(a) shall not be exercisable at any time when the patient is an infant, and

(b) shall not be exercised unless the judge has reason to believe that the patient is incapable of making a valid will for himself".

Supplementary provisions as to wills executed under s. 103 (1) (dd)

18. The following section shall be inserted in the principal Act after section 103—

"103A. (1) Where under section 103 (1) of this Act the judge makes or gives an order, direction or authority requiring or authorising a person (in this section referred to as 'the authorised person') to execute a will for a patient, any will executed in pursuance of that order, direction or authority shall be expressed to be signed by the patient acting by the authorised person, and shall be—

(a) signed by the authorised person with the name of the patient, and with his own name, in the presence of two or more witnesses present at the same time, and

(b) attested and subscribed by those witnesses in the presence of the authorised person, and

(c) sealed with the official seal of the Court of Protection.

(2) The Wills Act 1837 shall have effect in relation to any such will as if it were signed by the patient by his own hand, except that in relation to any such will—

(a) section 9 of that Act (which makes provision as to the manner of execution and attestation of wills) shall not apply, and

(b) in the subsequent provisions of that Act any reference to execution in the manner thereinbefore required shall be construed as a reference to execution in the manner required by subsection (1) of this section.

(3) Subject to the following provisions of this section, any such will executed in accordance with subsection (1) of this section shall have the like effect for all purposes as if the patient were capable of making a valid will and the will had been executed by him in the manner required by the Wills Act 1837.

(4) So much of subsection (3) of this section as provides for such a will to have effect as if the patient were capable of making a valid will—

(a) shall not have effect in relation to such a will in so far as it disposes of any immovable property, other than immovable property in England or Wales, and

(b) where at the time when such a will is executed the patient is domiciled in Scotland or Northern Ireland or in a country or territory outside the United Kingdom, shall not have effect in relation to that will in so far as it relates to any other property or matter, except any property or matter in respect of which, under the law of his domicile, any question of his testamentary capacity would fall to be determined in accordance with te law of England and Wales.

(5) For the purposes of the application of the Inheritance (Family Provision) Act 1938 in relation to a will executed in accordance with subsection (1) of this section, in section 1 (7) of

that Act (which relates to the deceased's reasons for disposing of his estate in a particular way)—

(a) any reference to the deceased's reasons for which anything is done or not done by his will shall be construed as a reference to the reasons for which it is done or (as the case may be) not done by that will, and

(b) any reference to a statement in writing signed by the deceased shall be construed as a reference to a statement in writing signed by the authorised person in accordance with a direction given in that behalf by the judge."

Other amendments of Mental Health Act 1959

19. (1) In section 107 of the principal Act (preservation of interests in patient's property), in subsection (3), after the words "or other dealing" there shall be inserted the words "(otherwise than by will)".

(2) In section 117 of the principal Act (reciprocal arrangements in relation to Scotland and Northern Ireland as to exercise of powers), after subsection (2) there shall be inserted the following subsection:—

"(2A) Nothing in this section shall affect any power to execute a will under section 103 (1) (dd) of this Act or the effect of any will executed in the exercise of such a power".

(3) In section 119 of the principal Act (interpretation of Part VIII), at the end of subsection (1) there shall be inserted the words "'will' includes a codicil".

APPENDIX F

STATISTICS RESPECTING TESTATE AND INTESTATE DISTRIBUTION IN 1977 COMPILED BY THE MINISTRY OF FINANCE

Reference Number	Testate	Intestate	Spouse Survived (M) Male	Children Survived	Gross Estate	Net Estate	Jointures, etc. to Spouse	Total Property to Spouse	% of Net Estate	Jointures, etc. to Children	Total Property to Children	% of Net Estate	Other Beneficiaries
1		X	—	X	4,000	4,000	—	—	—	—	4,000	100	—
2	X		—	X	8,435	8,435	—	—	—	4,285	8,435	100	—
3	X		—	—	43,010	42,866	—	—	—	—	—	—	43,010
4	X		—	—	53,902	53,017	—	—	—	—	—	—	53,017
5	X		X	X	95,169	95,169	40,035	95,169	100	—	—	—	—
6	X		X(M)	X	7,943	7,943	1,500	7,943	100	—	—	—	—
7	X		—	X	6,039	6,039	—	—	—	500	6,039	100	—
8		X	X(M)	X	25,958	25,958	20,000	25,958	100	—	—	—	—
9	X		—	—	9,045	8,407	—	—	100	—	—	—	8,407
10	X		X	X	20,676	20,676	—	20,676	100	—	—	—	—
11	X		—	X	13,450	12,398	—	—	—	—	12,048	97	350
12	X		—	X	35,649	34,468	—	—	—	—	34,468	100	—
13	X		—	—	19,863	18,449	—	—	—	—	—	—	18,449
14		X			2,185	2,185	—	2,185	100	—	—	—	—
15	X			X	31,173	31,173	—	—	—	17,500	31,173	100	—
16		X	—	—	124,986	117,544	—	—	—	—	—	—	124,986
17	X		—	—	82,676	82,500	—	—	—	—	—	—	82,500
18	X		—	X	125,060	124,883	—	—	—	35,439	111,132	88	13,751
19	X		—	X	50,766	50,408	—	—	—	—	50,408	100	—
20	X		—	X	21,590	20,100	—	—	—	1,294	18,100	90	2,000
21	X		X	—	70,086	70,086	50,509	70,086	100	—	—	—	—
22	X		—	X	22,086	21,113	—	—	—	—	21,113	100	—
23	X		X	X	55,859	55,110	16,041	55,110	100	—	—	—	—
24	X		—	X	57,057	57,057	—	—	—	—	57,057	100	—
25	X		X	X	39,335	24,561	20,000	24,561	100	—	—	—	—
26		X	—	—	4,900	4,900	—	—	—	—	—	—	4,900
27		X	X(M)	—	23,081	22,170	18,884	22,170	100	—	—	—	—
28	X		X	X	47,162	47,162	45,000	47,162	100	—	—	—	—
29			—	X	1,888	1,888	—	—	100	—	1,888	100	—
30		X	—	—	11,627	11,272	—	—	—	—	—	—	11,272

APPENDIX F — *Continued*

Reference Number	Testate	Intestate	Spouse Survived (M) Male	Children Survived	Gross Estate	Net Estate	Jointures, etc. to Spouse	Total Property to Spouse	% of Net Estate	Jointures, etc. to Children	Total Property to Children	% of Net Estate	Other Beneficiaries
31	X		—	X	66,585	65,381	—	—	—	—	65,381	100	—
32	X		—	X	17,560	17,560	—	—	—	—	17,560	100	—
33	X		X	X	58,725	58,725	—	58,725	100	—	—	—	—
34	X		X	—	39,186	39,081	30,000	39,081	100	—	—	—	—
35	X			X	34,000	34,000	—	—	—	—	34,000	100	—
36	X		X	—	954,443	885,031	105,825	341,166	39	—	—	—	543,864
37	X		X(M)	X	29,112	27,177	21,500	27,177	100	—	—	—	—
38	X		X	X	14,651	14,051	14,015	14,051	100	—	—	—	—
39		X	X(M)	—	20,087	8,910	—	8,910	100	—	—	—	—
40		X	—	—	5,000	5,000	—	—	—	—	—	—	5,000
41	X		X	X	72,500	72,500	72,500	72,500	100	—	—	—	—
42	X		X	X	34,993	34,553	33,803	34,553	100	—	—	—	—
43	X		X	X	60,978	59,717	12,171	59,717	100	—	—	—	—
44	X		—	—	28,838	27,536	—	—	—	—	—	—	27,536
45	X		X	X	19,635	19,635	16,475	19,635	100	—	—	—	—
46	X		—	X	47,727	47,440	—	—	—	—	47,440	100	—
47	X		X	—	20,708	20,708	18,000	18,000	87	—	—	—	2,708
48	X		—	X	17,368	16,608	—	—	—	—	16,608	100	—
49	X		X	X	35,530	34,375	21,631	34,375	100	—	—	—	—
50		X	X(M)	—	9,717	8,225	775	8,225	100	—	—	—	—
51	X		—	X	32,024	32,024	—	—	—	—	32,024	100	—
52		X	—	X	2,772	2,772	—	—	—	—	2,772	100	—
53		X	—	—	7,082	6,354	—	—	—	—	—	—	6,354
54	X		—	—	22,599	21,049	—	—	—	—	—	—	21,049
55		X	—	—	2,027	1,519	—	—	—	—	—	—	1,519
56	X		X	X	201,326	175,354	57,320	175,354	100	—	—	—	—
57	X		—	X	73,546	72,568	—	—	—	—	72,568	100	—
58	X		X(M)	—	22,946	22,013	—	22,013	100	—	—	—	—
59	X		X	X	12,907	12,647	—	—	—	—	12,647	100	—
60		X	X	X	99,753	98,515	—	64,400	65	—	34,115	35	—

APPENDIX F — *Continued*

Reference Number	Testate	Intestate	Spouse Survived (M) Male	Children Survived	Gross Estate	Net Estate	Jointures, etc. to Spouse	Total Property to Spouse	% of Net Estate	Jointures, etc. to Children	Total Property to Children	% of Net Estate	Other Beneficiaries
61		X	X	X	51,899	50,838	6,359	45,889	90	—	4,982	10	—
62	X		X(M)	—	4,987	4,987	1,687	4,437	89	—	—	—	550
63	X		X	—	3,361	2,971	266	2,971	100	—	—	—	—
64	X		X	X	17,000	17,000	17,000	17,000	100	—	—	—	—
65	X		X(M)	X	56,115	55,557	46,942	55,557	100	—	—	—	—
66	X		—	—	4,169	4,169	—	—	—	—	—	—	4,169
67	X		X	X	30,608	29,786	7,701	29,786	100	—	—	—	—
68		X	X	—	12,000	12,000	12,000	12,000	100	—	—	—	—
69	X		X(M)	X	42,647	42,647	42,647	42,647	100	—	—	—	—
70	X		X	—	66,392	66,392	65,442	66,392	100	—	—	—	—
71	X		X	X	30,415	30,188	23,637	26,351	87	3,837	3,837	13	—
72	X		X	X	161,526	156,677	47,299	99,037	63	—	57,640	27	—
73	X		—	X	852	852	—	—	—	—	—	—	852
74		X	X	—	1,975	1,975	1,975	1,975	100	—	—	—	—
75		X	X	X	31,410	30,295	26,077	30,295	100	—	—	—	—
76	X		—	X	13,521	12,700	—	—	—	—	12,700	100	—
77	X		—	—	14,362	12,464	—	—	—	—	—	—	12,464
78	X		X	X	656	656	—	—	—	—	656	100	—
79	X		X(M)	X	91,396	90,420	66,821	66,821	74	—	23,599	26	—
80	X		—	X	181,118	173,087	—	—	—	—	173,087	100	—
81	X		X	X	334,334	327,595	27,643	176,626	54	—	123,542	38	27,427
82		X	—	—	20,137	18,031	—	—	—	—	—	—	18,031
83	X		X	—	17,301	14,588	11,063	14,588	100	—	—	—	—
84	X		X	X	23,719	22,943	21,326	22,943	100	—	—	—	—
85	X		X	X	97,727	96,434	89,187	96,434	100	—	—	—	—
86		X	X(M)	X	250	insolvent	—	—	—	—	—	—	—
87	X		X	X	65,613	64,607	30,898	44,004	68	—	20,603	32	—
88	X		—	X	39,423	38,748	—	—	—	—	38,748	100	—
89	X		—	X	32,612	32,612	—	—	—	—	32,612	100	—
90	X		—	—	79,347	55,473	—	—	—	—	—	—	55,473

APPENDIX F — *Continued*

Reference Number	Testate	Intestate	Spouse Survived (M) Male	Children Survived	Gross Estate	Net Estate	Jointures, etc. to Spouse	Total Property to Spouse	% of Net Estate	Jointures, etc. to Children	Total Property to Children	% of Net Estate	Other Beneficiaries
91	X		—	—	18,906	17,898	—	—	—	—	—	—	17,898
92	X		X	X	21,628	20,528	8,153	20,528	100	—	—	—	—
93	X		—	X	2,555	2,555	—	—	—	—	2,555	100	—
94	X		X	X	119,400	117,653	—	117,653	100	—	—	—	—
95	X		X	X	72,421	71,643	60,840	71,643	100	—	—	—	—
96	X		X	—	54,556	54,556	50,000	54,556	100	—	—	—	—
97	X		X	X	72,752	72,752	70,770	72,752	100	—	—	—	—
98		X	X(M)	X	4,595	4,595	—	4,595	100	—	—	—	—
99	X		—	X	26,454	26,309	—	—	—	—	26,039	98	270
100	X		X	—	6,374	6,374	3,906	6,374	100	—	—	—	—
101	X		—	X	54,644	53,478	—	—	—	1,476	53,478	100	—
102		X	—	—	11,994	11,994	—	—	—	—	—	—	11,994
103		X	X	X	148,167	146,985	118,332	128,202	87	18,783	18,783	13	—
104	X		X	X	14,022	14,022	12,022	14,022	100	—	—	—	—
105	X		—	X	69,676	68,348	—	—	—	20,000	68,348	100	—
106	X		—	—	126,453	126,105	—	—	—	—	—	—	126,105
107	X		—	—	25,811	25,032	—	—	—	—	—	—	25,032
108	X		—	X	78,460	77,307	—	—	—	1,424	77,307	100	—
109		X	—	—	288	insolvent	—	—	—	—	—	—	—
110	X		X	X	18,903	18,013	15,298	18,013	100	—	—	—	—
111	X		X	X	21,096	21,096	20,526	21,096	100	—	—	—	—
112	X		—	—	18,994	18,704	—	—	—	—	—	—	18,704
113	X		X	X	38,779	37,638	26,684	37,638	100	—	—	—	—
114	X		X	X	8,310	7,430	—	—	—	—	7,430	100	—
115		X	—	X	208	insolvent	—	—	—	—	—	—	—
116	X		—	X	61,704	60,848	—	—	—	—	60,848	100	—
117		X	X	—	53,513	52,553	49,333	52,553	100	—	—	—	—
118	X				42,606	42,023	—	—	—	—	—	—	42,023
119	X		—	X	54,859	54,565	—	—	—	—	54,565	100	—
120	X		X	—	55,095	55,095	52,000	55,095	100	—	—	—	—

APPENDIX F — *Continued*

Reference Number	Testate	Intestate	Spouse Survived (M) Male	Children Survived	Gross Estate	Net Estate	Jointures, etc. to Spouse	Total Property to Spouse	% of Net Estate	Jointures, etc. to Children	Total Property to Children	% of Net Estate	Other Beneficiaries
121	X		—	X	14,771	14,165	—	—	—	—	14,165	100	—
122		X	X(M)	—	2,000	2,000	—	2,000	100	—	—	—	—
123	X		X(M)	X	27,628	27,628	27,127	27,628	100	—	—	—	—
124	X		—	—	80,035	79,243	—	—	—	—	—	—	79,243
125	X		—	—	23,584	23,254	21,084	23,254	100	—	—	—	—
126		X	—	—	10,296	10,296	—	—	—	—	—	—	10,296
127	X		—	—	92,512	91,194	—	—	—	—	—	—	91,194
128		X			6,750	6,750	—	—	—	6,750	6,750	100	—
129	X		X	X	53,394	52,584	4,822	52,584	100	—	—	—	—
130	X		X	X	36,906	35,883	20,085	35,883	100	—	—	—	—
131	X		—	X	49,069	47,669	—	—	—	—	47,669	100	—
132	X		X(M)	X	30,511	30,511	27,312	30,511	100	—	—	—	—
133	X			X	11,402	10,623	—	—	—	—	10,623	100	—
134	X		X	X	491,414	491,414	460,132	491,414	100	—	—	—	—
135	X		—	X	59,841	58,825	—	—	—	—	57,178	97	1,647
136		X	—	—	500	500	—	—	—	—	—	—	500
137	X		—	X	30,690	29,134	—	—	—	—	29,134	100	—
138	X		—	—	6,214	6,027	—	—	—	—	—	—	6,027
139	X		—	X	82,656	79,685	—	—	—	11,000	79,685	100	—
140		X	—	—	43,318	42,618	—	—	—	—	—	—	42,618
141	X		X	X	57,767	57,579	—	57,579	100	—	—	—	—
142	X		X	X	97,844	94,795	64,735	81,577	86	13,218	13,218	14	—
143	X		X	X	52,903	52,647	27,601	52,647	100	—	—	—	—
144	X		X	X	91,410	90,551	49,205	90,551	100	—	—	—	—
145	X		—	X	56,494	55,550	—	—	—	—	55,500	100	—
146	X		X	X	132,888	129,210	74,781	114,902	89	6,638	6,638	5	7,670
147		X	X	—	20,000	20,000	20,000	20,000	100	—	—	—	—
148		X	X	—	58,206	56,549	56,549	56,549	100	—	—	—	—
149	X		—	—	12,254	11,302	—	—	—	—	—	—	11,302
150	X		X	X	160,419	153,094	15,320	15,320	10	—	134,774	88	3,000

APPENDIX F — *Continued*

Reference Number	Testate	Intestate	Spouse Survived (M) Male	Children Survived	Gross Estate	Net Estate	Jointures, etc. to Spouse	Total Property to Spouse	% of Net Estate	Jointures, etc. to Children	Total Property to Children	% of Net Estate	Other Beneficiaries
151	X		X	—	16,289	14,589	332	14,589	100	—	—	—	—
152		X	X	X	23,900	23,900	19,000	23,900	100	—	—	—	—
153	X		—	X	7,389	5,872	—	—	—	—	5,872	100	—
154	X		—	X	83,743	82,629	—	—	—	—	82,629	100	—
155	X		—	—	19,516	18,539	—	—	—	—	—	—	18,539
156	X		X	X	1,550	1,550	—	1,550	100	—	—	—	—
157	X		—	X	5,466	4,376	—	—	—	—	1,094	25	3,282
158	X		—	X	5,229	4,679	—	—	—	—	4,679	100	—
159	X		X	X	2,000	1,450	—	1,450	100	—	—	—	—
160	X		—	X	37,971	35,727	—	—	—	—	35,727	100	—
161	X		—	X	57,530	55,969		—	—	—	55,969	100	—
162		X	—	—	400	400	—	—	—	—	—	—	400
163	X		—	X	50,870	50,870	—	—	—	—	50,870	100	—
164	X		—	X	57,582	56,506	—	—	—	16,465	56,506	100	—
165		X	X	—	51,883	51,883	47,459	51,883	100	—	—	—	—
166	X		—	X	5,138	5,138	—	—	—	—	5,138	100	—
167		X	X	—	2,488	2,488	—	2,488	100	—	—	—	—
168	X		—	X	15,583	15,583	—	—	—	—	15,583	100	—
169	X		X	X	33,221	33,221	33,221	33,221	100	—	—	—	—
170	X		X	X	24,319	24,319	24,319	24,319	100	—	—	—	—
171	X		X	X	30,304	30,304	26,500	30,304	100	—	—	—	—
172	X		—	—	39,572	38,307	—	—	—	—	—	—	38,307
173	X		—	—	47,279	46,243	—	—	—	—	—	—	46,243
174		X	X(M)	—	9,678	insolvent	—	—	—	—	—	—	—
175	X		—	—	8,171	7,388	—	—	—	—	—	—	7,388
176	X		X	X	302,264	248,678	105,561	189,246	76	497	52,301	21	5,000
177	X		X	X	107,932	104,252	—	13,916	13	—	90,336	87	—
178	X		—	X	19,430	19,430	—	—	—	—	19,430	100	—
179	X		X	—	17,977	17,106	15,000	17,106	100	—	—	—	—
180	X		—	X	58,567	57,142	—	—	—	—	57,142	100	—

APPENDIX F — *Continued*

Reference Number	Testate	Intestate	Spouse Survived (M) Male	Children Survived	Gross Estate	Net Estate	Jointures, etc. to Spouse	Total Property to Spouse	% of Net Estate	Jointures, etc. to Children	Total Property to Children	% of Net Estate	Other Beneficiaries
181	X		X	X	9,716	9,716	7,356	9,716	100	—	—	—	—
182	X		—	—	59,768	59,443	—	—	—	—	—	—	59,443
183	X		X	X	392,244	378,766	98,595	181,756	48	7,000	111,755	30	85,255
184	X		—	X	36,430	35,695	—	—	—	—	35,695	100	—
185	X		—	X	63,942	62,761	—	—	—	—	62,761	100	—
186	X		—	X	110,198	102,446	—	—	—	—	102,446	100	—
187	X		X	—	4,094	4,094	—	4,094	100	—	—	—	—
188	X		X	—	9,061	9,061	98	9,061	100	—	—	—	—
189		X	X(M)	—	62,522	61,272	2,849	61,272	100	—	—	—	—
190	X		X	X	30,114	29,858	—	29,858	100	—	—	—	—
191		X	—	X	1,800	1,800	—	—	—	—	800	44	1,000
192	X		X(M)	X	18,388	18,020	500	18,020	100	—	—	—	—
193		X	—	—	491	191	—	—	—	—	—	—	191
194	X		—	X	38,690	34,270	—	—	—	18,889	34,270	100	—
195	X		X	X	69,518	65,000	65,000	65,000	100	—	—	—	—
196		X			9,999	9,309	—	—	—	—	—	—	9,309
197		X	X(M)	—	22,578	22,578	22,500	22,578	100	—	—	—	—
198	X		X	X	57,121	56,507	25,000	56,507	100	—	—	—	—
199	X		—	—	3,219	3,219	—	—	—	—	—	—	3,219
200	X		—	X	52,284	52,078	—	—	—	—	52,078	100	—
201	X		—	X	36,174	34,930	—	—	—	—	34,930	100	—
202		X	X	—	2,722	1,435	—	1,435	100	—	—	—	—
203	X		—	—	17,831	16,991	—	—	—	—	—	—	16,991
204	X		X	—	366,820	364,024	8,854	275,588	76	—	—	—	87,478
205	X		—	—	79,501	65,872	—	—	—	—	—	—	65,872
206	X		—	—	17,572	17,349	—	—	—	—	—	—	17,349
207	X		X	X	35,235	35,313	27,423	35,313	100	—	—	—	—
208		X	—	X	3,432	3,432	—	—	—	—	3,432	100	—
209	X		X	—	10,659	10,309	10,309	10,309	100	—	—	—	—
210	X		—	X	1,647,	1,647	—	—	—	—	1,647	100	—

APPENDIX F — *Continued*

Reference Number	Testate	Intestate	Spouse Survived (M) Male	Children Survived	Gross Estate	Net Estate	Jointures, etc to Spouse	Total Property to Spouse	% of Net Estate	Jointures, etc to Children	Total Property to Children	% of Net Estate	Other Beneficiaries
211	X		—	—	20,749	19,744	—	—	—	—	—	—	19,744
212		X	X	—	9,212	9,212	—	9,212	100	—	—	—	—
213		X	—	—	38,278	37,612	—	—	—	—	—	—	37,612
214		X	—	—	3,600	2,842	—	—	—	—	—	—	2,842
215	X		X	X	61,332	60,095	19,892	60,095	100	—	—	—	—
216	X		X	X	74,788	74,254	—	74,254	100	—	—	—	—
217	X		X(M)	—	40,557	39,680	3,356	39,680	100	—	—	—	—
218	X		X(M)	X	29,211	28,553	—	9,401	33	—	19,152	67	—
219	X		X	X	56,307	54,312	15,020	54,312	100	—	—	—	

NOTES TO APPENDIX F

1. Files from which information is gathered are taken from two days in 1977, the last year succession duties were levied. This represents 222 estates out of over 13,000 probated in 1977. This is probably too short a period from which to draw information of any statistical relevance. Nevertheless, the information is randomly collected and applies to all B.C. The information gathered is indicative if not conclusive.
2. 173 estates are testate (78%); 49 estates are intestate (22%).
3. The average value of all these estates is approximately $50,000.
4. The average value of all intestate estates is approximately $22,000; the mean value is closer to $10,000. These values include property held in joint tenancy.
5. The largest intestacy in that period involved an estate of $148,167 (see 103); however, it appears all but $10,000 of that was held in joint tenancy. The wife received $128,202 or 87% of the estate; children received $18,783 or 13% of the estate. Only $10,000 of that estate was subject to intestate succession.
6. It would appear that the current provisions respecting intestate succession functioned adequately for these estates.
7. Even if we assume that, due to inflation, estate values for 1982 will be 50% greater than for 1977, it would appear that in most cases the current intestate succession provisions will function adequately.
8. Of those intestacies where the estate exceeded $20,000, in only two did the intestate provisions with respect to spousal share figure (see 60 and 61); in all other intestacies either the bulk of property was held in joint tenancy, or there was no competition between spouse and children.
9. In only 67 of the testate estates (38% of testate estates; 30% of all estates) did the deceased leave both spouse and children surviving him. In 53 (or 79%) of those estates, everything was left to the surviving spouse. In 6 of the 14 estates in which the surviving spouse did not receive everything, either the spouse received the bulk of the estate or the deceased's estate was very large and the surviving spouse was still generously provided for. In 4 of these 14 estates the deceased virtually disinherited his spouse.
10. These observations, drawn from the graph, tend to support the option under consideration to give the surviving spouse everything on an intestacy. This seems to be the result favoured in most testate estates, and seems to be the natural result in most intestate estates.

APPENDIX G

STATISTICS RESPECTING TESTATE AND INTESTATE DISTRIBUTION IN DECEMBER, 1981 COMPILED FROM THE FILES OF THE VANCOUVER PROBATE REGISTRY

Reference Number	Testate	Intestate	Survived by Spouse	Survived by Children	Value of Estate	Spouse's Share	% of Estate	Children's Share	% of Estate	Other Beneficiaries	% of Estate
1	X				26,500					26,500	100
2		X		X	9,554			9,554	100		
3		X			26,000					26,000	100
4		X	X	X	39,550	26,066	66	13,484	34		
5		X			1,182						
6		X	X		5,687	5,687	100				
7		X		X	20,181			20,181	100		
8	X		X	X	108,465	55,000	51	17,821	16	35,643	32
9	X		X		128,218	128,218	100				
10	X		X		124,795	32,616	26			92,179	74
11	X			X	45,728			35,728	78	10,000	22
12	X			X	376,758			376,758	100		
13	X				81,405					81,405	100
14	X		X		38,653	38,653	100				
15	X				47,778					47,778	100
16	X		X		165,000	165,000	100				
17	X				21,235					21,235	100
18	X		X		6,687	6,687	100				
19	X				245,387					245,387	100
20	X			X	57,388			45,388	79	12,000	21
21	X			X	6,730			6,730	100		
22	X			X	152,802			152,802	100		
23	X			X	12,889			12,889	100		
24	X			X	144,820			142,820	99	2,000	1
25	X		X		318,869	318,869	100				
26	X			X	141,205			141,205	100		
27	X			X	92,371			92,371	100		
28	X				130,581					130,581	100
29	X				20,044					20,044	100
30	X		X		11,815	11,815	100				

APPENDIX G — *Continued*

Reference Number	Testate	Intestate	Survived by Spouse	Survived by Children	Value of Estate	Spouse's Share	% of Estate	Children's Share	% of Estate	Other Beneficiaries	% of Estate
31	X		X		15,212	15,212	100				
32	X		X	X	373,900	373,900	100				
33	X		X	X	94,387	94,387	100				
34	X		X	X	125,111	125,111	100				
35		X			51,228					51,228	100
36	X		X	X	18,961	189,961	100				
37	X			X	38,188			38,188	100		
38	X			X	138,100			138,100	100		
39	X			X	49,867			49,867	100		
40	X				9,000					9,000	100
41	X		X	X	84,911	74,911	88	10,000	12		
42	X		X	X	222,696	222,696	100				
43	X		X	X	16,035	16,035	100				
44	X		X		257,803	257,803	100				
45	X		X	X	59,171	500	1	45,000	76	13,671	23
46	X			X	24,312			24,312	100		
47	X		X	X	28,451	28,451	100				
48		X			35,797					35,797	100
49		X	X		67,468	67,468	100				
50	X		X	X	17,039	17,039	100				
51	X			X	35,005			35,005	100		
52	X			X	10,350			10,350	100		
53	X			X	1,387			1,387	100		
54	X		X	X	42,466	42,466	100				
55	X			X	44,894			40,894	91	4,000	9
56	X		X	X	11,467	11,467	100				
57	X		X	X	139,691	139,691	100				
58	X			X	65,420			65,420	100		
59	X		X	X	128,018	128,018	100				
60	X		X	X	65,134			65,134	100		

APPENDIX G — *Continued*

Reference Number	Testate	Intestate	Survived by Spouse	Survived by Children	Value of Estate	Spouse's Share	% of Estate	Children's Share	% of Estate	Other Beneficiaries	% of Estate
61	X		X	X	21,658	1,500	7	20,158	93		
62	X			X	48,264			48,264	100		
63	X				20,400					20,400	100
64	X		X	X	200,000	200,000	100				
65	X			X	12,361			9,270	75	3,090	25
66	X			X	2,082,980			2,082,980	100		
67	X				207,879					207,879	100
68	X				124,079					124,079	100
69	X		X	X	249,701	74,910	30	174,790	70		
70		X			9,465					9,465	100
71	X				7,618					7,618	100
72	X				10,333					10,333	100
73	X			X	35,604			17,802	50	17,802	50
74		X	X	X	15,000	15,000	100				
75		X			16,716					16,716	100
76		X			35,579					35,579	100
77		X	X		223,808	223,808	100				
78		X			770					(insolvent)	
79		X		X	10,743					10,743	100
80	X		X	X	9,321	9,321	100				
81	X		X	X	48,500	48,500	100				
82	X				209,149					209,149	100
83	X			X	47,014			4,000	9	43,014	91
84	X				96,051					96,051	100
85	X			X	19,260			19,260	100		
86	X				171,715					171,715	100
87	X			X	106,804			106,804	100		
88	X			X	17,668			17,668	100		
89	X		X	X	5,576	5,576	100				
90	X				568,059					568,059	100

APPENDIX C — *Continued*

Reference Number	Testate	Intestate	Survived by Spouse	Survived by Children	Value of Estate	Spouse's Share	% of Estate	Children's Share	% of Estate	Other Beneficiaries	% of Estate
91	X				45,371					45,371	100
92	X			X	16,180			16,180	100		
93	X		X	X	96,094	96,094	100				
94	X			X	16,990					16,990	100
95	X		X	X	24,500	24,500	100				
96	X				430,928					430,928	100
97	X		X	X	54,022	54,022	100				
98	X				561,438					561,438	100
99	X				208,438					208,438	100
100	X		X	X	6,388	6,388	100				
101	X		X	X	38,583	38,583	100				
102	X			X	13,444			13,444	100		
103	X		X	X	16,205	16,205	100				
104	X				622,850					622,850	100
105	X				385,265					385,265	100
106	X				49,133					49,133	100
107	X		X	X	7,499	7,499	100				
108	X			X	18,766			18,766	100		
109	X				34,550					34,550	100
110	X			X	24,608			24,608	100		
111	X			X	16,801			16,801	100		
112	X		X	X	16,497	16,497	100				
113	X		X	X	64,204	64,204	100				
114	X			X	118,794			118,794	100		
115	X				89,203					89,203	100
116	X			X	9,800			9,800	100		
117		X			16,135					16,135	100
118		X		X	34,199			34,199	100		
119		X			7,657					(escheat)	
120	X		X	X	113,206	113,206	100				

NOTES TO APPENDIX G

1. Files from which information is gathered are taken from five days in 1981. This represents 120 estates out of over 5,000 probated in Vancouver in 1977. This is probably too short a period from which to draw information of any statistical relevance. Nevertheless, the information is randomly collected and serves as a comparison with the information received from the Ministry of Finance. The information gathered is indicative if not conclusive.
2. 101 estates are testate (84%); 19 estates are intestate (16%).
3. The average value of all these estates is approximately $105,000.
4. The average value of all intestate estates is approximately $22,000; the mean value is closer to $15,000. These values do not include property held in joint tenancy.
5. It would appear that the current provisions respecting intestate succession functioned adequately for these estates.
6. We assumed that, due to inflation, estate values for 1982 will be 50% greater than for 1977; this information corresponds to that assumption.
7. Of those intestacies where the estate exceeded $20,000, in only one did the intestate provisions with respect to spousal share figure (see 4); in all other intestacies there was no competition between spouse and children.
8. In only 32 of the testate estates (32% of testate estates; 30% of all estates) did the deceased leave both spouse and children surviving him. In 26 (or 81%) of those estates, everything was left to the surviving spouse. In two of the six estates in which the surviving spouse did not receive everything, either the spouse received the bulk of the estate or the deceased's estate was very large and the surviving spouse was still generously provided for. In four of these six estates the deceased virtually disinherited his spouse
9. These observations, drawn from the graph, correspond to those made with respect to the information received from the Ministry of Finance.

APPENDIX H

WILLS VARIATION ACT

(R.S.B.C. 1979, c. 435)

Interpretation

1. In this Act

"court" means the Supreme Court;

"executor" includes an administrator with will annexed;

"probate" includes letters probate and letters of administration with will annexed.

Maintenance from estate

2. (1) Notwithstanding any law or statute to the contrary, if a testator dies leaving a will which does not, in the court's opinion, make adequate provision for the proper maintenance and support of the testator's wife, husband or children, the court may, in its discretion, in an action by or on behalf of the wife, husband or children, order that the provision that it thinks adequate, just and equitable in the circumstances be made out of the estate of the testator for the wife, husband or children.

(2) For the purposes of this Act, an illegitimate child shall be treated as if he were a legitimate child of his mother.

(3) In an action under this section the court may accept the evidence it considers proper of the testator's reasons, so far as ascertainable,

(a) for making the dispositions made in his will; or

(b) for not making adequate provision for his wife, husband or children, including any statement in writing signed by the testator.

(4) In estimating the weight to be given to a statement referred to in subsection (3), the court shall have regard to all the circumstances from which an inference may reasonably be drawn as to the accuracy or otherwise of the statement.

Court may make order subject to conditions

3. The court may attach the conditions to the order that it thinks fit, or may refuse to make an order in favour of a person whose character or conduct, in the court's opinion, disentitles him or her to the benefit of an order under this Act.

Lump sum or periodical payments

4. In making an order the court may, if it thinks fit, order that the provision shall consist of a lump sum or a periodical or other payment.

Payments fall rateably on estate

5. The incidence of the payments ordered shall, unless the court otherwise determines, fall rateably on the whole estate of the testator, or in cases where the authority of the court does not extend or cannot, directly or indirectly, be made to extend to the whole estate, then to so much of it as is situated in the Province.

Power to release part of estate

6. The court may exonerate a part of the testator's estate from the incidence of the order after hearing those of the parties that may be affected by the exoneration that it considers necessary, and may for that purpose direct any executor or trustee, or appoint any person, to represent any of those parties.

Power of court to allow commutation

7. The court may at any time fix a periodic payment or lump sum to be paid by a legatee or devisee, to represent, or in commutation of, the proportion of the sum ordered to be paid that falls on the portion of the estate in which he is interested, and exonerate that portion from further liability. The court may direct how the periodic payment shall be secured, to whom the lump sum shall be paid and how it shall be invested for the benefit of the person to whom the commuted payment was payable.

Representative action

8. (1) Where an action has been commenced on behalf of a person, it may be treated by the court as, and so far as regards the question of limitation shall be deemed to be, an action on behalf of all persons who might apply.

(2) A plaintiff in an action shall, within 10 days after the issue of the writ of summons, register a certificate of lis pendens in the form prescribed under section 213 of the Land Title

Act against the land sought to be affected in the land title office in which the title to the land is registered.

Effect of order

9. On an order being made under this Act, the portion of the estate comprised in it or affected by it shall be held subject to the provisions of the order, but the order does not bind land unless it is registered as a charge against the land affected in the land title office in which the title to the land is registered.

Limitation

10. (1) An action shall not be heard by the court at the instance of a party claiming the benefit of this Act unless

(a) the action is commenced within 6 months from the date of the issue of probate of the will in the Province or the resealing in the Province of probate of the will;

(b) a copy of the writ of summons has been served on the executor of the will; and

(c) where there are minor children of the testator, or where the wife, husband or a child of the testator is mentally disordered, a copy of the writ of summons has been served on the Public Trustee.

(2) Where the Public Trustee is served with a copy of the writ of summons under subsection (1), he is entitled to appear, to be heard and to any costs that the court orders.

(3) The Lieutenant Governor in Council may, by regulation, prescribe a fee or scale of fees payable by the plaintiff to the Public Trustee for investigating an action under this Act.

No distribution until 6 months after probate

11. Until the expiration of the period of 6 months from the issue of probate of the will in the Province or the resealing in the Province of probate of the will, the executor or trustee shall not, without the consent of all persons who would be entitled to apply, or unless authorized by order of the court, distribute any portion of the estate to beneficiaries under the will, and until the expiration of the same period no title passing by devise to a beneficiary shall be registered in a land title office unless under a like consent or order, except subject to the liability of being charged by an order made under this Act.

Mortgage in anticipation of order invalid

12. A person for whom provision is made under this Act shall not anticipate that provision, and a mortgage, charge or assignment of any kind of or over that provision made or assignment of any kind of or over that provision made before the order of the court is of no force, validity or effect; and no such mortgage, charge or assignment made after the order of the court is made is of any force, validity or effect unless made with the court's permission.

Court may discharge or vary order

13. Where the court has ordered periodic payments, or that a lump sum be invested for the benefit of a person, it may inquire whether at any subsequent date the party benefited by its order has become possessed of or entitled to provisions for his proper maintenance or support, and into the adequacy of those provisions, and may discharge, vary or suspend its order, or make another order that is just in the circumstances.

Duties

14. (1) Where an order is made by the court under this Act, all duties payable on the transmission of the estate under the will of the testator shall be computed as if the provisions of the order had been part of the will.

(2) Any duty paid in excess of the amount required to be paid under this section shall, on application, be returned to the person entitled to receive it.

Appeal

15. A person who considers himself prejudically affected by an order of the court may appeal to the Court of Appeal.

Rules of Court

16. The provisions of the Supreme Court Act empowering the Lieutenant Governor in Council to make Rules of Court extend to and authorize the making of rules to govern procedure under this Act.

APPENDIX I

ESTATE ADMINISTRATION ACT

(R.S.B.C. 1979, c. 114)

Persons to whom administration may be granted

6. (1) Where a person dies intestate, or the executor named in a will refuses to prove the will, the court may grant the administration of the estate of the testator or of the intestate to the widow or husband of the testator or intestate, or grant the administration to one or more of the next of kin or to the widow or to the husband jointly with one or more of the next of kin, as to the court seems expedient; but where the executors named in a will refuse to prove the will, the administration to be granted by the court shall be administration with the will annexed, and the will of the deceased in the testament expressed shall be performed and observed. An administrator so appointed by the court has the same powers as an executor to demand or to recover by an action or otherwise payment of debts due to the intestate, and also to administer his estate, and has in respect of them the same responsibilities as an executor, if appointed, would have had.

(2) Where a person dies possessed of real estate, the court shall, in granting letters of administration or letters of administration with the will annexed, have regard to the rights and interests of persons interested in his real estate, and his heirs at law and devisees of his real estate, if not of the next of kin, are equally entitled to the grant with the next of kin.

Discretionary power in appointment of administrator

7. Where a person dies intestate, or leaves a will, but without having appointed an executor willing and competent to take probate, or where the executor at the time of the death of the person resides out of the Province, and it appears to the court to be necessary or convenient by reason of the insolvency of the estate of the deceased or of other special circumstances to appoint some person to be the administrator of the estate of the deceased, or part of it, other than the person who but for this section would have been entitled to a grant of administration, the court may, in its discretion, appoint a person it thinks fit to be the administrator, on his giving security the court shall direct. Every such administration may be limited or on condition or otherwise, as the court thinks fit.

Right to apply for discharge

31. (1) A personal representative of a deceased person may at any time apply to the court to be discharged from his office, whether as personal representative alone or as personal representative and trustee.

(2) A personal representative may make the application whether he has been appointed executor under a will or administrator by the court, and in either case either alone or jointly with another person, and either before or after a grant of letters probate or letters of administration, and whether the personal representative is a trustee of the estate or part of it or not, and whether the personal representative has dealt or partially dealt with the estate or a portion of it or not, or has to any extent acted in the exercise of a trust or power conferred on or vested in him or not.

Procedure on application

32. The application shall be made ex parte by notice of motion supported by an affidavit, setting out the circumstances and showing what parties are interested in the estate under administration or to which the trusts apply. On the hearing of the application the court may, if the court thinks it expedient, give directions as to the parties to be served with a notice of the further hearing of the application, and may prescribe the manner of giving the notice, whether personally or by way of substituted service or by any manner of service, outside the Province or otherwise, and the limit of time of the notice, and may adjourn the hearing of the application.

Passing of accounts and order for discharge of personal representative

33. Where the accounts of the personal representative applying for discharge have been passed under section 101 of the Trustee Act, and the court is satisfied that no further passing of accounts is necessary, or where all parties agree, then on a person or trust company being appointed under this Part in the place and stead of the personal representative applying for discharge, and on compliance with section 35, the personal representative applying for discharge is, on the order of the court to that effect, discharged as personal representative, and is, except in respect of undisclosed acts, neglects, defaults or accounts, or dishonest or unlawful conduct, or breach of trust while holding office as the personal representative, released from all

actions, claims and demands for or concerning his office as personal representative. The production of an office copy of the order discharging him and approving of the passing of his accounts is, except as stated above, an absolute bar to any such action, claim or demand.

PART 5

Interpretation

85. In this Part and Parts 10 and 11

"common law spouse" means either a person who is united to another person by a marriage that, although not a legal marriage, is valid by common law, or a person who has lived and cohabited with another person as a spouse and has been maintained by that other person for a period of not less than 2 years immediately preceding his death; and

"illegitimate child" means, in respect of the estate of his father, an illegitimate child who was born out of wedlock and has not been legitimized by operation of law, and who was under the care, control, maintenance or protection, either physically or financially, of his father for a period of not less than one year immediately preceding his father's death.

Allowance for common law spouse and illegitimate children

86. Where an intestate leaves surviving him in the Province a common law spouse or an illegitimate child, the court may order that there be retained, allotted and applied for the support, maintenance and benefit of the common law spouse or of the illegitimate child, or both, so much of the net real or personal estate, or both, of the intestate as the court sees fit, to be payable in the manner the court directs.

Application by motion

87. An application under this Part may be made by motion by the common law spouse, the administrator of the intestate's estate, the illegitimate child or by a person acting as guardian or next friend, if the illegitimate child is a minor, and on the hearing of the application the court may consider all the evidence that may be relevant in making an order under section 86.

Notice to other parties

88. Where the intestate leaves surviving him a widow or widower, or a legitimate child, no order shall be made under section 86 until notice of the application has been given to the widow or widower, the legitimate child or a person acting as guardian or next friend if the legitimate child is a minor, and to the administrator of the estate giving them an opportunity to be heard.

Limitation of actions

89. An application under this Part shall be brought not later than 6 months after the date on which administration of the estate was granted.

PART 7

Interpretation

94. In this Part

"estate" includes both real and personal property;

"issue" includes all lawful lineal descendants of the ancestor.

Application

95. (1) This Part, except sections 96, 98 (b), 107 and 110, applies only in cases of death on and after May 1, 1926.

(2) Section 98 (b) applies only in cases of death on or after April 1, 1958.

(3) Section 96 applies only in cases of death on or after April 1, 1955.

(4) Section 96, as amended by the Administration Act Amendment Act, 1963, applies only in cases of death on or after April 1, 1963.

(5) Section 96, as amended by the Administration Act Amendment Act, 1966, applies only to the estates of persons who die on or after April 1, 1966.

(6) Section 107 shall for all purposes be deemed to be and to declare the law as in force on and from December 19, 1925, except as to property of an estate set off or assigned as dower to a widow before March 29, 1934.

(7) Section 110 applies only in cases of death on and after April 1, 1959.

Intestate leaving spouse and issue

96. (1) If an intestate dies leaving a spouse and issue, his estate, where the net value of it does not exceed $20,000, shall go to his spouse.

(2) Where the net value exceeds $20,000, the spouse is entitled to $20,000 and has a charge on the estate for that sum.

(3) Of the residue of the estate, after payment of the sum of $20,000, where the intestate dies leaving

(a) a spouse and one child, 1/2 shall go to the spouse;

(b) a spouse and children, 1/3 shall go to the spouse.

(4) If a child has died leaving issue and the issue is alive at the date of the intestate's death, the spouse shall take the same share of the estate as if the child had been living at the date.

(5) In this section "net value" means the value of an estate wherever situated, both within and without the Province, after payment of the charges on it and the debts, funeral expenses, expenses of administration and probate fees.

Aliens

97. The land in the Province of a person who is not a Canadian citizen and who dies intestate shall be distributed as if he had been a Canadian citizen.

Issue

98. If an intestate dies leaving

(a) issue, his estate shall be distributed, subject to the rights of the spouse, if any, per stirpes among the issue;

(b) a spouse but no issue, his estate shall go to his spouse.

Neither spouse nor issue

99. If an intestate dies leaving no spouse or issue, his estate shall go to his father and mother in equal shares if both are living, but if either of them is dead the estate shall go to the survivor.

No spouse, issue or parent

100. If an intestate dies leaving no spouse, issue, father or mother, his estate shall go to his brothers and sisters in equal shares, and if a brother or sister is dead, the children of the deceased brother or sister shall take the share their parent would have taken if living, but no further representation shall be admitted.

Where estate goes to next of kin

101. If an intestate dies leaving no spouse, issue, father, mother, brother or sister, his estate shall go to his nephews and nieces in equal shares, and in no case shall representation be admitted.

Distribution among next of kin

102. If an intestate dies leaving no spouse, issue, father, mother, brother, sister, nephew or niece, his estate shall be distributed equally among the next of kin of equal degree of consanguinity to the intestate, and in no case shall representation be admitted.

Kindred and half blood

103. For the purpose of this Part, degrees of kindred shall be computed by counting upward from the intestate to the nearest common ancestor and then downward to the relative. The kindred of the half blood shall inherit equally with those of the whole blood in the same degree.

Posthumous births

104. Descendants and relatives of the intestate, conceived before his death but born thereafter, shall inherit as if they had been born in the lifetime of the intestate and had survived him.

Advances to children

105. (1) Where any child of a person who has died wholly intestate has been advanced by the intestate by portion, the portion shall be reckoned, for the purposes of this section only, as part of the estate of the intestate distributable according to law. If the advancement is equal to or greater than the share of the estate which the child would be entitled to receive as above reckoned, the child and his descendants shall be excluded from any share in the estate; but if the advancement is not equal to the share, the child and his descendants are entitled to receive so much only of the estate of the intestate as is sufficient to make all the shares of the children in the estate and advancement equal as nearly as can be estimated.

(2) The value of any portion advanced shall be deemed to be that which has been expressed by the intestate or acknowledged by the child in writing, otherwise the value shall be the value of the portion when advanced.

(3) The onus of proving that a child has been maintained or educated, or has been given money, with a view to a portion is on the person so asserting, unless the advancement has been expressed by the intestate, or acknowledged by the child, in writing.

Estate undisposed of by will

106. All the estate not disposed of by will shall be distributed as if the testator had died intestate and had left no other estate.

Abolition of dower and curtesy

107. No widow is entitled to dower out of land of which her deceased husband died wholly or partially intestate, or in land which was absolutely disposed of by her husband in his lifetime or by his will. No husband is entitled to an estate by the curtesy in the land of his deceased wife dying intestate.

Matrimonial home and household furnishings to spouse

108. (1) In this section and section 109

(a) a parcel of land shown as a separate taxable parcel on a taxation roll for the current year prepared under the Taxation (Rural Area) Act or on a real property tax roll for the current year prepared by the collector of a municipality, and that has as improvements situated on it a building assessed and taxed in the current year as an improvement, in which the deceased and his spouse were ordinarily resident, owned or jointly owned by the deceased, and not leased to another person; or

(b) a share owned or jointly owned by the deceased in a corporation the memorandum of association of which stipulates that a building owned or operated by the corporation shall be owned and operated exclusively for the benefit of shareholders in the corporation who are occupants of the building, where the value of the share is equivalent to the capital value of a suite owned by the corporation, in which suite the deceased and his spouse were ordinarily resident, and which was not leased to any other person;

"household furnishings" means chattels usually associated with the enjoyment by the spouses of the matrimonial home.

(2) Notwithstanding section 107, and in addition to any other provision in this Part, but subject to section 111, in an intestacy,

(a) except where the matrimonial home would otherwise go under this Part to a surviving spouse, the matrimonial home shall devolve to and become vested in those persons by law beneficially entitled to it, and, subject to the liability of the land comprising the matrimonial home for foreclosure or the payments of debts, those persons by law beneficially entitled to it shall hold the matrimonial home in trust for an estate for the life of the surviving spouse, or so long as the surviving spouse wishes to retain the estate for life; and

(b) the household furnishings shall go to the surviving spouse.

(3) This section applies to the estate of a person who dies on or after April 1, 1972.

Contiguous land not incidental to matrimonial home

109. Where, on application by any person who is, but for section 108, entitled to a share in the distribution of the matrimonial home, it is shown that any land contiguous to the matrimonial home could not reasonably be regarded as contributing to the use and enjoyment of the matrimonial home as a residence, the court may decrease the size of the parcel of land that devolves to and becomes vested in those persons by law beneficially entitled to it under section 108.

Illegitimate children

110. For the purposes of this Act, an illegitimate child shall be deemed to be the legitimate child of his mother.

Separation as a bar

111. (1) The surviving spouse shall, in an intestacy, take no part of the deceased spouse's estate if the spouses had, immediately preceding the death of one spouse, separated for not less than one year with the intention of living separate and apart, and had not during that period lived together with the intention of resuming cohabitation, unless the court, on application, otherwise orders.

(2) The court may, on the application of the surviving spouse, or of the executor or administrator, or of any person interested in the estate of the deceased spouse, and on evidence the court considers relevant, determine the matter, and the court may in its discretion direct the costs to be paid out of the estate of the deceased spouse.

Uniform construction

112. This Part shall be so interpreted and constructed as to effect the general purpose of making uniform the law of those provinces which enact identical or substantially the same provisions.

APPENDIX J

WILLS ACT

(R.S.B.C. 1979, c. 434)

Revocation by marriage

15. A will is revoked by the marriage of the testator, except where

(a) there is a declaration in the will that it is made in contemplation of the marriage; or

(b) the will is made in exercise of a power of appointment of property which would not in default of the appointment pass to the heir, executor or administrator of the testator or to the persons entitled to the estate of the testator if he died intestate.

Revocation of gift on dissolution

16. (1) Where in a will a testator

(a) gives an interest in property to his spouse;

(b) appoints his spouse executor or trustee; or

(c) confers a general or special power of appointment on his spouse, and after the making of the will and before his death

(d) a judicial separation has been ordered in respect of his marriage;

(e) his marriage is terminated by a decree absolute of divorce; or

(f) his marriage is found to be void or declared a nullity by a court then, unless a contrary intention appears in the will, the gift, appointment or power is revoked and the will takes effect as if the spouse had predeceased the testator.

(2) In subsection (1) "spouse" includes a person considered by the testator to be his spouse.

APPENDIX K

UNIFORM RETIREMENT PLAN BENEFICIARIES ACT

(1975 Proceedings, pages 30, 178)

Interpretation

1. In this Act

(a) "participant" means a person who is entitled to designate another person to receive a benefit payable under a plan on the participant's death;

(b) "plan" means

(i) a pension, retirement, welfare or profit-sharing fund, trust, scheme, contract, or arrangement for the benefit of employees, former employees, agents, or former agents of an employer or their dependents or beneficiaries, or

(ii) a fund, trust, scheme, contract, or arrangement for the payment of an annuity for life or for a fixed or variable term, created before or after the commencement of this Act;

(c) "will" has the same meaning as in the *Wills Act*.

Designation of beneficiaries

2. A participant may designate a person to receive a benefit payable under a plan on the participant's death

(a) by an instrument signed by him or signed on his behalf by another person in his presence and by his direction; or

(b) by will,

and may revoke the designation by either of those methods.

Designation by will

3. A designation in a will is effective only if it relates expressly to a plan, either generally or specifically.

Revocation by will

4. A revocation in a will is effective to revoke a designation made by instrument only if the revocation relates expressly to the designation, either generally or specifically.

Latest designation prevails

5. Notwithstanding the *Wills Act*, a later designation revokes an earlier designation, to the extent of any inconsistency.

Revocation of will

6. Revocation of a will is effective to revoke a designation in the will.

Designations and revocations

7. A designation or revocation contained in an instrument purporting to be a will is not invalid by reason only of the fact that the instrument is invalid as a will.

Revocation

8. A designation in an instrument that purports to be but is not a valid will is revoked by an event that would have the effect of revoking the instrument if it had been a valid will.

Idem

9. Revocation of a designation does not revive an earlier designation.

Effective date

10. Notwithstanding the *Wills Act*, a designation or revocation in a will is effective from the time when the will is signed.

Payment

11. After the death of a participant who has made a designation that is in effect at the time of his death, the person designated may enforce payment of the benefit payable to him under the plan, but the person against whom the payment is sought to be enforced may set up any defence that he could have set up against the participant or his personal representative.

Where Act and plan inconsistent

12. Where this Act is inconsistent with a plan, this Act applies, unless the inconsistency relates to a designation made or proposed to be made after the making of a benefit payment where the benefit payment would have been different if the designation had been made before the benefit payment, in which case the plan applies.

Where Act does not apply

13. This Act does not apply to a contract or to a designation of a beneficiary to which the *Insurance Act* applies.

APPENDIX L

FAMILY RELATIONS ACT

(R.S.B.C. 1979, c. 121)

PART 3

Equality of entitlement to family assets on marriage breakup

43. (1) Subject to this Part, each spouse is entitled to an interest in each family asset on or after March 31, 1979 when

(a) a separation agreement;

(b) a declaratory judgment under section 44;

(c) an order for dissolution of marriage or judicial separation; or

(d) an order declaring the marriage null and void

respecting the marriage is first made.

(2) The interest under subsection (1) is an undivided half interest in the family asset as a tenant in common.

(3) An interest under subsection (1) is subject to

(a) an order under this Part; or

(b) a marriage agreement or a separation agreement.

(4) This section applies to a marriage entered into before or after this section comes into force.

Declaratory judgment

44. On application by 2 spouses married to each other or by one of the spouses, the Supreme Court may make a declaratory judgment that the spouses have no reasonable prospect of reconciliation with each other.

Family assets defined

45. (1) Subject to section 46, this section defines family asset for the purposes of this Act.

(2) Property owned by one or both spouses and ordinarily used by a spouse or a minor child of either spouse for a family purpose is a family asset.

(3) Without restricting the generality of subsection (2), the definition of family asset includes

(a) where a corporation or trust owns property that would be a family asset if owned by a spouse,

(i) a share in the corporation; or

(ii) an interest in the trust owned by the spouse;

(b) where property would be a family asset if owned by a spouse, property

(i) over which the spouse has, either alone or with another person, a power of appointment exercisable in favour of himself; or

(ii) disposed of by the spouse but over which the spouse has, either alone or with another person a power to revoke the disposition or a power to use or dispose of the property;

(c) money of a spouse in an account with a savings institution where that account is ordinarily used for a family purpose;

(d) a right of a spouse under an annuity or a pension, home ownership or retirement savings plan; or

(e) a right, share or an interest of a spouse in a venture to which money or money's worth was, directly or indirectly, contributed by or on behalf of the other spouse.

(4) The definition of family asset applies to marriages entered into and property acquired before or after March 31, 1979.

Excluded business assets

46. (1) Where property is owned by one spouse to the exclusion of the other and is used primarily for business purposes and where the spouse who does not own the property made no direct or indirect contribution to the acquisition of the property by the other spouse or to the operation of the business, the property is not a family asset.

(2) In section 45 (3) (e) or subsection (1), an indirect contribution includes savings through effective management of household or child rearing responsibilities by the spouse who holds no interest in the property.

Onus of proof

47. The onus is on the spouse opposing a claim under section 43 to prove that the property in question is not ordinarily used for a family purpose.

Marriage agreements

48. (1) This section defines marriage agreement for the purposes of this Part and this definition applies to marriages entered into, marriage agreements made and to property of a spouse acquired before or after this section comes into force.

(2) A marriage agreement is an agreement entered into by a man and a woman prior to or during their marriage to each other to take effect on the date of their marriage or on the execution of the agreement, whichever is later, for

(a) management of family assets or other property during marriage; or

(b) ownership in, or division of, family assets or other property during marriage, or on the making of an order for dissolution of marriage, judicial separation or a declaration of nullity of marriage.

(3) A marriage agreement, or an amendment or rescission of a marriage agreement, must be in writing, signed by both spouses, and witnessed by one or more other persons.

(4) Except as provided in this Part, where a marriage agreement is made in compliance with subsection (3), the terms described by subsection (2) (a) and (b) are binding between the spouses whether or not there is valuable consideration for the marriage agreement.

(5) A minor who has capacity to marry has, with the prior consent of the Supreme Court or a County Court, capacity to enter into a valid marriage agreement.

(6) Where a minor who has capacity to marry has purported to enter into a marriage agreement without the consent required under subsection (5), the Supreme Court or a County Court may at any time order that the marriage agreement is binding on and is for the benefit of the minor.

(7) In a marriage agreement, a dum casta provision applicable where the spouses are living separate and apart is null and void.

(8) A provision of a marriage agreement that is void or voidable is severable from the other provisions of the marriage agreement.

(9) Where a marriage agreement provides that specific gifts made to one or both spouses are not disposable without the consent of the donor, the donor shall be deemed to be a party to the marriage agreement for the purpose of enforcement or amendment of the provision.

Filing in land title office

49. (1) A spouse who is a party to a marriage agreement or separation agreement may sign and file a notice in prescribed form setting out

(a) the full name and last known address of each spouse who is a party to the marriage agreement or separation agreement;

(b) a description of land to which the marriage agreement or separation agreement relates; and

(c) the provisions of the marriage agreement or separation agreement that relate to the land described in the notice in the land title office of the land title district in which land described in the notice is situated.

(2) On the filing of a notice under subsection (1), accompanied by payment of the prescribed fee, the registrar may register the notice, in the same manner as a charge is registered, against the land described in the notice.

(3) Where a notice is registered under subsection (2), the registrar shall not allow registration of a transfer, mortgage, agreement for sale or conveyance of the fee simple in the land, or lease of the land, unless each spouse or former spouse who is a party to the marriage agreement or marriage separation signs and files in the land title office a cancellation or postponement notice in prescribed form.

(4) Where a spouse or former spouse

(a) cannot, after a reasonable search is made, be located;

(b) unreasonably refuses to sign or file a cancellation notice under subsection (3); or

(c) is a mentally incompetent person,

the Supreme Court may, on application, order that the registrar cancel or postpone the notice of marriage agreement or separation agreement.

(5) Where a cancellation or postponement notice is filed under subsection (3) or an order is made under subsection (4), the registrar shall cancel or postpone the registration of the notice of marriage agreement or separation agreement in the same manner as the registration of a charge is cancelled or postponed.

(6) Where a provision of a marriage agreement or of a separation agreement relates to a mobile home, this section applies

(a) for the registration of the notice described in subsection (1) as a security instrument under the Mobile Home Act against the mobile home; and

(b) on registration of the notice, to subsequent dealings with the mobile home and notice.

Enforceability of interest in property

50. (1) In this section "interest of a spouse" means the interest of a spouse arising under section 43, a marriage agreement or a separation agreement.

(2) Section 29 of the Land Title Act applies to an interest of a spouse in land.

(3) Where, on the acquisition of property other than land, a person does not have actual notice of the interest of a spouse in the property the interest is not enforceable against that person.

(4) Notwithstanding subsections (2) and (3), the interest of a spouse is enforceable against the other spouse from the date the interest comes into being.

Judicial reapportionment on basis of fairness

51. Where the provisions for division of property between spouses under section 43 or their marriage agreement, as the case may be, would be unfair having regard to

(a) the duration of the marriage;

(b) the duration of the period during which the spouses have lived separate and apart;

(c) the date when property was acquired or disposed of;

(d) the extent to which property was acquired by one spouse through inheritance or gift;

(e) the needs of each spouse to become or remain economically independent and self sufficient; or

(f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,

the Supreme Court, on application, may order that the property covered by section 43 or the marriage agreement, as the case may be, be divided into shares fixed by the court. Additionally or alternatively the court may order that other property not covered by section 43 or the marriage agreement, as the case may be, of one spouse be vested in the other spouse.

Determination of ownership, possession or division

52. (1) In proceedings under this Part or on application, the Supreme Court may determine any matter respecting the ownership, right of possession or division of property under this Part, including the vesting of property under section 51, and may make orders which are necessary, reasonable or ancillary to give effect to the determination.

(2) In an order under this section, the court may, without limiting the generality of subsection (1), do one or more of the following:

(a) declare the ownership of or right of possession to property;

(b) order that, on a division of property, title to a specified property granted to a spouse be transferred to, or held in trust for, or vested in the spouse either absolutely, for life or for a term of years;

(c) order a spouse to pay compensation to the other spouse where property has been disposed of, or for the purpose of adjusting the division;

(d) order partition or sale of property and payment to be made out of the proceeds of sale to one or both spouses in specified proportions or amounts;

(e) order that property forming all or a part of the share of either or both spouses be transferred to, or in trust for, or vested in a child;

(f) order that a spouse give security for the performance of an obligation imposed by order under this section, including a charge on property; or

(g) where property is owned by spouses as joint tenants, sever the joint tenancy.

(3) Where the Supreme Court, on application, is satisfied that a spouse has made or intends to make a gift of property to a third person, or has transferred or intends to transfer property to a third person who is not a purchaser in good faith for value, for the purpose of defeating a claim to an interest in the property the other spouse may then or in the future have under this Part, the Supreme Court may make an order under this section to restrain the making of the gift or transfer, or vest all or a portion of the property in, or in trust for, the other spouse.

Interim orders

53. Where a proceeding under this Part has been commenced, the Supreme Court may make an interim order to restrain the disposal of family assets or other property at issue, or for the possession, delivery, safekeeping and preservation of the property, and this order may be made ex parte.

Variation of marriage settlements

54. (1) This section applies to an ante nuptial or post nuptial settlement that is not a marriage agreement under this Part.

(2) The Supreme Court may, on application, not more than 2 years after an order for dissolution of marriage, for judicial separation or declaring a marriage null and void, inquire into an ante nuptial or post nuptial settlement affecting either spouse and, whether or not there are children, make any order that, in its opinion, should be made to provide for the application of all or part of the settled property for the benefit of either or both spouses or a child of a spouse or of the marriage.

(3) The Supreme Court may, on application, where circumstances warrant, extend the period during which an application may be made or power exercised under this section.

Application of this Part

55. (1) Where there is a conflict between this Part and the Partition of Property Act, or the Married Woman's Property Act, this Part prevails.

(2) The rights under this Part are in addition to and not in substitution for rights under equity or any other law.

APPENDIX M

INTESTATES' ESTATES ACT, 1952 (U.K.)

(15 & 16 Geo. 6 & 1 Eliz. 2, c. 64)

[30 October 1952]

SECOND SCHEDULE **Section 6**

Rights of Surviving Spouse as Respects the Matrimonial Home

1. (1) Subject to the provisions of this Schedule, where the residuary estate of the intestate comprises an interest in a dwelling-house in which the surviving husband or wife was resident at the time of the intestate's death, the surviving husband or wife may require the personal representative, in exercise of the power conferred by section forty-one of the principal Act (and with due regard to the requirements of that section as to valuation) to appropriate the said interest in the dwelling-house in or towards satisfaction of any absolute interest of the surviving husband or wife in the real and personal estate of the intestate.

(2) The right conferred by this paragraph shall not be exercisable where the interest is—

(a) a tenancy which at the date of the death of the intestate was a tenancy which would determine within the period of two years from that date; or

(b) a tenancy which the landlord by notice given after that date could determine within the remainder of that period.

(3) Nothing in subsection (5) of section forty-one of the principal Act (which requires the personal representative, in making an appropriation to any person under that section, to have regard to the rights of others) shall prevent the personal representative from giving effect to the right conferred by this paragraph.

(4) The reference in this paragraph to an absolute interest in the real an personal estate of the intestate includes a reference to the capital value of a life interest which the surviving husband or wife has under this Act elected to have redeemed.

(5) Where part of a building was, at the date of the death of the intestate, occupied as a separate dwelling, that dwelling shall for the purposes of this Schedule be treated as a dwelling-house.

2. Where—

(a) the dwelling-house forms part of a building and an interest in the whole of the building is comprised in the residuary estate; or

(b) the dwelling-house is held with agricultural land and an interest in the agricultural land is comprised in the residuary estate; or

(c) the whole or a part of the dwelling-house was at the time of the intestate's death used as a hostel or lodging house; or

(d) a part of the dwelling-house was at the time of the intestate's death used for purposes other than domestic purposes,

the right conferred by paragraph 1 of this Schedule shall not be exercisable unless the court, on being satisfied that the exercise of that right is not likely to diminish the value assets in the residuary estate (other than the said interest in the dwelling-house) or make them more difficult to dispose of, so orders.

3. (1) The right conferred by paragraph 1 of this Schedule—

(a) shall not be exercisable after the expiration of twelve months from the first taking out of representation with respect to the intestate's estate;

(b) shall not be exercisable after the death of the surviving husband or wife;

(c) shall be exercisable, except where the surviving husband or wife is the sole personal representative, by notifying the personal representative (or, where there are two or more personal representatives of whom one is the surviving husband or wife, all of them except the surviving husband or wife) in writing.

(2) A notification in writing under paragraph (c) of the foregoing sub-paragraph shall not be revocable except with the consent of the personal representative; but the surviving husband or wife may require the personal representative to have the said interest in the dwelling-house valued in accordance with section forty-one of the principal Act and to inform him or her of the result of that valuation before he or she decides whether to exercise the right.

(3) Subsection (9) of the section forty-seven A added to the principal Act by section two of his Act shall apply for the purposes of the construction of the reference in this paragraph to the first taking out of representation, and the proviso to subsection (5) of that section shall apply for the purpose of enabling the surviving husband or wife to apply for an extension of the period of twelve months mentioned in this paragraph.

4. (1) During the period of twelve months mentioned in paragraph 3 of this Schedule the personal representative shall not without the written consent of the surviving husband or wife

sell or otherwise dispose of the said interest in the dwelling-house except in the course of administration owing to want of other assets.

(2) An application to the court under paragraph 2 of this Schedule may be made by the personal representative as well as by the surviving husband or wife, and if, on an application under that paragraph, the court does not order that the right conferred by paragraph 1 of this Schedule shall be exercisable by the surviving husband or wife, the court may authorise the personal representative to dispose of the said interest in the dwelling-house within the said period of twelve months.

(3) Where the court under sub-paragraph (3) of paragraph 3 of this Schedule extends the said period of twelve months, the court may direct that this paragraph shall apply in relation to the extended period as it applied in relation to the original period of twelve months.

(4) This paragraph shall not apply where the surviving husband or wife is the sole personal representative or one of two or more personal representatives.

(5) Nothing in this paragraph shall confer any right on the surviving husband or wife as against a purchaser from the personal representative.

5. (1) Where the surviving husband or wife is one of two or more personal representatives, the rule that a trustee may not be a purchaser of trust property shall not prevent the surviving husband or wife from purchasing out of the estate of the intestate an interest in a dwelling-house in which the surviving husband or wife was resident at the time of the intestate's death.

(2) The power of appropriation under section forty-one of the principal Act shall include power to appropriate an interest in a dwelling-house in which the surviving husband or wife was resident at the time of the intestate's death partly in satisfaction of an interest of the surviving husband or wife in the real and personal estate and partly in return for a payment of money by the surviving husband or wife to the personal representative.

6. (1) Where the surviving husband or wife is a person of unsound mind or a defective, a requirement or consent under this Schedule may be made or given on his or her behalf by the committee or receiver, if any, or, where there is no committee or receiver, by the court.

(2) A requirement or consent made or given under this Schedule by a surviving husband or wife who is an infant shall be as valid and binding as it would be if he or she were of age; and, as respects an appropriation in pursuance of paragraph 1 of this Schedule, the provisions of section forty-one of the principal Act as to obtaining the consent of the infant's parent or guardian, or of the court on behalf of the infant, shall not apply.

7. (1) Except where the context otherwise requires, references in this Schedule to a dwelling-house include references to any garden or portion of ground attached to and usually occupied with the dwelling-house or otherwise required for the amenity or convenience of the dwelling-house.

(2) This Schedule shall be construed as one with Part IV of the principal Act.

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